90-1078

(1)

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD LYMAN, Jr., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, Jr.,
Petitioners,
vs.
CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GIDEON KANNER
Counsel of Record
CROSBY, HEAFEY, ROACH & MAY
700 South Flower Street, Suite 2400
Los Angeles, California 90017
(213) 628-6733

G. RICHARD MORRY
CHERYL A. NAKAMURA
RUSH, MORE, CRAVEN, SUTTON, MORRY & BEH
745 Fort Street, 20th Floor
Honolulu, Hawaii 96813
(808) 521-0400
Attorneys for Petitioners

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Where a land owner makes seven attempts to obtain permission for all types of land use (*i.e.*, residential, commercial and industrial), and each is denied by the regulating municipality on the *avowed* grounds that *no* approvals will be granted without a "donation" to the municipality of some 80 acres of extremely valuable ($100,000,000) beachfront land which the City then stigmatizes by repeated announcements as having been targeted for eventual municipal acquisition, is such municipal conduct (a) actionable as a violation of the Constitution, and (b) is it reviewable under the "good faith planning" *vel non* standard of *Agins v. City of Tiburon*, 447 U.S. 255, 263, n. 9 (1980)?

2. Where a municipality has over a period of years rebuffed seven attempts to secure every type of land use, while insisting that no uses would be authorized unless the land owner "donates" some 80 acres of extremely valuable beachfront land for a park (without any semblance of a nexus required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)), and (a) a District Court enters a directed verdict for the defense, and (b) the Court of Appeals asserts in its opinion that the aggrieved plaintiffs did not raise the *Nollan* issue, even though they did so from the outset by every procedure known to the law (*i.e.*, pleadings, pretrial statements, briefing, arguments and evidence), have such plaintiffs been deprived of due process of law, and are they entitled to relief from this Court at least by summary remand with directions to consider the important constitutional issue thus ignored below?

3. Where a land owner tries seven times to obtain permission for all types of land use, and each is denied

in open violation of local law on the avowed, and repeatedly stated grounds that no approvals whatever would be granted unless the owner "donates" some 80 acres of extremely valuable beachfront land to the City, and where upon the land owner's refusal to knuckle under to such extortionate demand, the land is zoned "park" and "preservation" which render it economically non-viable in private hands:

(a) does that give rise to a "ripe" federal claim within the meaning of *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 348, 350 n. 7 (1985),[1] and

(b) does that give rise to a "ripe" federal claim within the meaning of *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985)?[2]

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[1] *I.e.*, are seven futile applications of all types, coupled with the avowed and repeated municipal position that *no* land-use approvals would be granted without an extorted "donation" of 80 acres of beachfront land, sufficient to make the case "ripe"?

[2] *I.e.*, where there are no available inverse condemnation procedures in the state courts and it is so conceded (*see Lai v. City and County of Honolulu*, 841 F.2d 301, 303[3] (1988) for such concession), is the controversy "ripe" without resort to the conjectured state remedies, in light of *Williamson County's* holding that only ". . . reasonable, certain and adequate . . ." remedies (473 U.S. at 194) need be pursued before the aggrieved land owner may sue in federal court?

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PETITION FOR WRIT OF CERTIORARI

Petitioners[1] seek Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The parties are listed in the caption, except that a separate petition is being filed by Kaiser Development Co., a.k.a. Kacor Development Co., and Kaiser Hawaii Kai Development Co., collectively referred to as "Kaiser."

OPINIONS BELOW

The appeal below was decided by two per curiam opinions: *Kaiser Development Co., et al. v. City and County of Honolulu*, 898 F.2d 112 (9th Cir. 1990),[2] and an originally unpublished memorandum (previously reported as an Unpublished Table Case at 899 F.2d 18). Upon denial of a timely petition for rehearing, the memorandum was amended and published on September 4, 1990 (913 F.2d 573, 9th Cir. 1990) (see Appendix B). The District Court's opinion granting partial summary judgment is reported at 649 F. Supp. 926 (D.Haw. 1986) (Appendix E); its order directing a defense verdict is unpublished (see Appendix C).

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[1] Petitioners are trustees of the Princess Bernice Pauahi Bishop Estate, and are collectively referred to as "Bishop Estate." Princess Bernice Pauahi Bishop was last lineal descendant of King Kamehameha the Great, the first monarch of Hawaii.

[2] Astonishingly, that published "opinion" contains no holding; it consists of a string-citation to at times conflicting cases said to have been considered by the court below, and a statement of affirmance. It contains not a clue as to the court's *ratio decidendi*. See Appendix A.

JURISDICTION

This is an action for deprivation of property without due process, and an uncompensated taking accomplished (a) by ostensible regulations which in truth were an avowed effort to extort Petitioners' valuable beachfront land, and (b) by "condemnation blight," whereby private property is targeted for government acquisition, and is eventually *de facto* taken by delay or other unreasonable conduct engaged in as a use-preventing and value-depressing prelude to the acquisition.

Petitioners sued the City and County of Honolulu (City) in the U.S. District Court, with Kaiser as plaintiff and Bishop Estate as plaintiff-intervenor. The Court of Appeals affirmed on March 21, 1990. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing in Banc was denied on September 4, 1990. By order of Justice O'Connor, Circuit Justice, Petitioners' time to file this Petition was extended to January 3, 1991. This Court's jurisdiction is invoked pursuant to 20 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

A. General Background

Petitioners are trustees of the Princess Bernice Pauahi Bishop Estate/Kamehameha Schools, a charitable trust that holds land and uses the rents issues and profits to operate the Kamehameha Schools for native Hawaiian children. Because land held by Bishop Estate is invested by Hawaiians with great cultural and historical significance,[3] and because of the nonprofit nature of the trust, this land cannot be sold as that would divest the trust of the *raison d'etre* for its existence and adversely affect its non-profit status. As a charitable trust, Bishop Estate cannot engage in large scale land development business. See 26 U.S.C. § 501(b). Therefore, it contracts with developers (such as Kaiser) for improving selected parcels to generate revenues for the trust's charitable purposes.

B. The Subject Property

The 210-acre Queen's Beach lies in eastern Oahu, in Hawaii Kai, owned by Bishop Estate and developed by Kaiser.[4] Its part sought to be extorted by Honolulu contains

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[3] *See generally, Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). For an in-depth discussion of the cultural and religious significance of these lands to the local culture, see the Brief of Amicus Curiae of the Office of Hawaiian Affairs, filed in *Midkiff* (Nos. 83-141, 83-236, 83-283).

[4] Initial development of Hawaii Kai also suffered from unjustified government interference. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where the federal government tried to acquire ". . . a public aquatic park . . ." without paying for it (*Id.* at 180). No reason appears why Honolulu should be able to accomplish what this Court held may *not* be done constitutionally by the federal government.

some 80 acres. Queen's Beach has private utilities constructed by Kaiser during the incremental development of Hawaii Kai.

C. Bishop Estate's Claims And Their Disposition

For over 22 years (1961-1983), Honolulu's General and Detailed Land Use Plans provided for a resort at Queen's Beach. During that time the City induced Bishop Estate and Kaiser to provide millions of dollars' worth of land and off-site improvements to accommodate plan uses, *including a resort at Queen's Beach*. But *after* obtaining Bishop Estate's property and facilities, the City prohibited development of the resort.

To acquire a regional park without payment of just compensation, Honolulu engaged in avowed efforts to extort Queen's Beach. After Bishop Estate refused to knuckle under, Honolulu designated Queen's Beach as "Park" and "Preservation," and refused to permit any economically viable private use. Bishop Estate thus claimed a deprivation of property without due process, and an uncompensated taking.

The District Court granted partial summary judgment disallowing Bishop Estate's "regulatory taking" claim on the ground that it was not "ripe."[5] *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D.Haw. 1986). At

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[5] This ruling was premised on the remarkable ground that Bishop Estate had not applied for use permits for "park" and "preservation" uses. It disregarded evidence of several rejected attempts to develop in accordance with existing city plans, as well as a showing that the ostensibly permitted uses were not economically viable, *while the City conceded that at most there was a factual dispute on this point* (see 649 F. Supp. at 942, n. 21). How then summary judgment could be granted on a point on which there was a conceded factual dispute, is a mystery.

trial, after Bishop Estate rested its case, the Court directed a verdict against its remaining claims.

D. Statement Of Facts[6]

1. The City Induced Bishop Estate's Investment-Backed Expectations Of A Resort Development At Queen's Beach

The 1961, 1964 and 1977 General Plans for Oahu, designated Queen's Beach for resort development. A 1966 Detailed Land Use Plan for Hawaii Kai located three hotel sites at Queen's Beach (5,500 rooms), two commercial sites, and a 9-hole golf course. There has *never* been any suggestion that this Plan was in any way deficient.

At first, Hawaii Kai lacked utilities, and Kaiser was required to provide them. The City then required Bishop Estate to construct roadways, sewage, drainage, water, electric, telephone and gas systems.[7] Their cost (allocable to the planned resort at Queen's Beach) was $8.8 million. The value of the land so used was over $11 million. However, Bishop Estate was barred at trial from introducing this evidence, even though it contends that its reasonable investment-backed expectations were destroyed.

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[6] There is no dispute as to these facts since this is an appeal from a partial summary judgment and a directed verdict. Their depiction here is an abbreviated version of the facts presented in the court below, where Honolulu did not dispute them in its Appellee's Brief. Thus, the facts must be viewed favorably to Petitioners. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[7] Because of its size (*i.e.*, 6,000 acres, of which approximately 3,000 is developable) Hawaii Kai had to be developed in stages starting from its westerly boundary (where existing utility connections were located) towards the easterly end of the project where Queen's Beach is located.

2. The City's Predatory "Out-and-Out Extortion" Activities

A. The City's Refusal To Permit Uses Authorized By Its Own General Plan.

In 1971, an application was filed to rezone portions of Queen's Beach to conform to the plan (*i.e.*, for resort use).[8] But the City refused even to consider the application unless Bishop Estate "donated" the most valuable part of Queen's Beach for a regional park.[9] When Bishop Estate refused, the City Parks Department requested denial of the application so that the City could, at its leisure, consider acquisition of the property for a park. Bishop Estate offered to donate 2,400 acres of undevelopable Hawaii Kai conservation land for campsites and hiking trails, if the City would comply with the law and grant rezoning per the 1966 plan. Honolulu Mayor Frank Fasi rejected that proposal in a May 12, 1972 letter.

In 1973, after City Council meetings called by Mayor Fasi, the *Planning Department announced that the City would not even consider a rezoning application without a "donation" of a 20-acre beach park to the City.* It was then "suggested"[10] that the Hawaii Kai private sewage treatment plant, with a book value of $8-9 million, also be "dedicated" to the City.

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[8] *Note Well*: That application was necessary only because during the previous ten years the City ignored its own Charter, (§ 5-514) requiring zoning to be consistent with the General Plan.

[9] Plainly put, this was what this Court would over a dozen years later aptly characterize as "an out-and-out plan of extortion." *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 837 (1987).

[10] In response to a proposed increase in private sewer rates by Kaiser.

After Bishop Estate refused to give away its trust lands in order to obtain what it was clearly entitled to by law, the City Planning Department informed Kaiser that it should not bother refiling the rezoning application without acceding to the City's extortion attempt.

B. The Blighting Of Queen's Beach To Facilitate Is Acquisition By The City.

In 1975, Deputy Parks Director Ramon Duran issued a press release announcing that (a) many prime beachfront areas were "threatened" by private development; (b) those areas included 37 acres of Queen's Beach valued *by the City* at $32 million; (c) purchase of the land would be "much too expensive"; (d) the Park Department would seek "dedication" of those lands as condition to any proposed development; and (e) the Department had requested amendments to the General Plan to redesignate those areas as "Park" to "alert" developers of City intentions and — incredibly — to give it "better bargaining leverage in actually acquiring the land."[11] At trial Duran admitted that 37 acres of Queen's Beach were then targeted for City acquisition, that the proposed General Plan amendment was intended to publicize the City's acquisitory intent, and that the Department's position was that *no resort development whatever* should be allowed without the demanded "gift."

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[11] In spite of the fact that the City thus conceded its unlawful purpose to "blight" the subject property in anticipation of its acquisition, and to use the blight as a bargaining threat, the District Court refused to allow the reporter who had interviewed Duran to authenticate the newspaper article that publicized these events or even to lay a foundation for its introduction as contemporaneously recorded "admissions" of a party's representative. Bishop Estate was also prevented from using the article for impeachment purposes.

The General Plan was not amended because of the City Corporation Counsel's adverse legal opinion. Nonetheless, legal or not, the City's intent to extort a public park was confirmed by an August 1, 1975 letter from Duran assuring State Senator Fred Rohlfing that the City would be "exploring" "all possible avenues" to secure "dedication" of a 37-acre park at Queen's Beach when Bishop Estate reapplied for resort zoning. By a copy of this letter Bishop Estate was again advised of the futility of renewing its application without "donating" a park to the City.

Other events prevented Bishop Estate from renewing its application then. The State Parks Division had been instructed on September 1, 1975, to initiate State acquisition of a park at Queen's Beach, but had not identified the 102 acres covered by the state's legislative appropriation. Until that was done, Bishop Estate could not even tell which part of its land was to be acquired.[12]

On January 18, 1977, the City adopted a General Plan showing Queen's Beach as a resort. Six months later it passed a resolution prohibiting the filing of any significant rezoning applications except during the processing of the City's Development Plans.[13] In 1979 and 1980, the East Honolulu Development Plan was drafted; it reduced the resort areas down to 500-rooms. A "Preservation" designation was placed on the balance of the property. Kaiser then submitted a compromise plan for a resort of only 2,500 rooms (one-half the density of the 1966 plan), and residential uses for another 120 acres of Queen's Beach.

But the City Council did *not* retain the 1966 plan uses, did *not* follow the Planning Department's recommendations, and

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[12] *See People, etc. v. Peninsula Enterprises, Inc.*, 91 Cal.App.3d 332, 357-358, 153 Cal.Rptr. 895 (1979), discussing the plight of land owners faced with such government conduct.

[13] These plans were then being formulated by the City Department of General Planning.

did *not* adopt Kaiser's "compromise" plan. Instead, in November 1981, it passed a Plan which limited resort development to 500-rooms, but added the residential use proposed by Kaiser. This Plan, however, was vetoed on November 17, 1981, by new Mayor Eileen Anderson, who replaced Mayor Fasi. Mayor Anderson, returned the Plan to the Department of General Planning for reformulation by her newly appointed department heads.

Bishop Estate then filed a request with the Department of General Planning for resort development in accordance with the City's then still existing 1966 plan. However, City planning official Gene Connell responded that *only the uses shown on the Council's vetoed plan* (a 500-room resort and residential use at upper Queen's Beach) or uses shown on the Planning Department draft development plan (a 500-room resort and Preservation) would be considered.[14] Faced with this Hobson's choice, Bishop Estate requested retention of the 500-room resort adopted by the Council (and vetoed by Major Anderson) but not the residential use (to which it objected).

The Department did not approve either the 500-room resort or the residential development. Instead, it proposed: (a) a deletion of the Resort, and (b) enactment of a Plan designating 80 acres of Queen's Beach as "Park" and the rest "Preservation." Kaiser and Bishop Estate objected to this and requested a 2,500-room resort. The City Council rejected the request.

Because these events made it painfully clear that any meaningful development of the Queen's Beach area would be foreclosed, Bishop Estate tried to salvage something; Kaiser applied for a residential subdivision for "upper" Queen's

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[14] It must be emphasized that the City thus brazenly denied Bishop Estate uses *expressly* permitted by *existing* law, favoring instead uses enumerated in *rejected law* (*i.e.*, the vetoed plan).

Beach *in accordance with the then existing zoning.* This application too was rejected.

On May 17, 1983, the City Council repealed the 1966 plan and designated 80 acres of Queen's Beach "Park," and the balance "Preservation." It also adopted stop-gag zoning preventing inconsistent development pending a permanent zoning ordinance which, on March 1, 1984 again designated Queen's Beach "Preservation."

C. Bishop Estate's Efforts To Obtain Some Reasonable Use Of Queen's Beach.

Bishop Estate and Kaiser then filed a number of alternative applications (*i.e.*, residential, low density, medium density apartments and commercial uses) to amend the Plan after it was adopted. Each time, the City demanded a "gift" of a regional park as a condition of *any* development. These demands, however, were no longer for the 37-acre park. *Now the City wanted 80 acres before it would even consider any requests involving the remaining land.*[15] Also, the City requested a 75-acre "high tech" employment center and low cost housing.[16]

Thereafter, Leigh-Wa[illegible]Doo, Chairman of the City Council's Planning and Zoning Committee, sent a "feeler" through Kaiser as to a possibility of *some* payment for the beach

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[15] At trial, Bishop Estate's appraisers valued these 80 acres at over $100 million.

[16] These demands were documented in a memo of the City planner in charge of that region, which stated that: (a) the City's "key element" in East Hawaii Kai was the "gift" of a regional park; (b) other key elements were the inclusion of an employment center and the provision of low cost housing; and (c) the amendment request for low and medium density apartments be used as "trading chips" to "force" [*sic*] Bishop Estate to donate the park to the City.

park. When Bishop Estate responded, the City asserted that Queen's Beach had "little to no value" as it was now designated "Park" and would soon be so downzoned. Because of Bishop Estate's refusal to give in, the City then denied *all* amendment requests *including* the high tech employment center *which the City itself had asked for.*

Every conceivable type of land use was applied for at one time or another only to be rejected *avowedly* because the City's determination to exact a park at Queen's Beach which it accordingly rezoned as "preservation/park."[17]

D. Honolulu's Naked Extortion Demand.

In July 1984, Mayor Anderson issued an official policy statement of the City's intent to exact the "gift" of a park at Queen's Beach. That official publication, entitled "Plan for the Acquisition of Beach Front Lands on Oahu," expressly targeted portions of Queen's Beach for acquisition and

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[17] While this zoning ostensibly permits some uses (see 649 F. Supp. at 929, n. 4) *it was conceded* that there was "a significant factual dispute concerning the economic value of Queen's Beach under the present zoning" (649 F. Supp. at 942, n. 21). Eventually, Bishop Estate proved at trial that these ostensibly permitted uses were in fact infeasible. To the extent the opinion below asserts that one of Bishop's witnesses testified that the subject property would be "economically viable" as a golf course, that is a most unfortunate distortion of the record. This "testimony" was erroneously forced on Bishop Estate by *the trial court's insistence that in assessing economic viability the witness must ignore completely the cost of some $20,000,000 worth of infrastructure and refrain from allocating any return to the seven-figure value of land* that would become the conjectured golf course. Of course, Bishop Estate raised that egregiously erroneous ruling on appeal, but the court below completely ignored the submission and unaccountably asserted that this economically irrational and objected to testimony somehow "proved" economic viability of the subject property.

established the policy of "encouraging" developers to "dedicate" targeted parksites.

The City's exaction demands were devoid of any lawful authority. To begin with, at first the City had *no* ordinance authorizing dedications, so that its initial demands were wholly extra-legal. Moreover, a 1967 State statute limits counties' dedication demands for parklands as a condition of development. See HAW. REV. STAT. § 46-6. The City ignored this legislation for nine years; then it paid lip service to it by enacting an ordinance and regulations for its administration.[18]

Also, there was no "reasonable nexus" between the projected 80-acre park and the resort development. City Planning and Park officials conceded that the need for a "Park" designation must appear from the General Plan and departmental guidelines (expressed in acres per thousands of residents). *But the Hawaii Kai area already exceeded those standards, and in fact was rated number one amongst all communities on the island.* Bishop Estate's prior dedication of over 1,275 acres of parklands in Hawaii Kai, *for which no "credit" was given* (also in violation of State statute), gave Hawaii

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[18] Even then, the City violated local law. The ordinance and regulations limit the dedication of parklands to those serving residential areas (*hotel uses were specifically exempted*); they disallow exactions exceeding a certain land area; require that credit be given for previously dedicated parklands; provide for administration of the ordinance by the Department of Land Utilization (*not* the Department of General Planning); and specify procedures for administering the ordinance, including providing owners with notice and the right to be heard. HONOLULU HAW., 1978 REV. ORDINANCES, art. 7 (1983). *All of these provisions were ignored in this case. Thus, when the exaction demands for a regional park were made by City officials, they acted in open defiance of State statutes and their own ordinance and regulations,* as well as unconstitutionally.

Kai, which only contained 2.8% of the City's residents and 1.9% of its land area, *36.0% of all City parklands on the entire island of Oahu!*

Former City Planning Directors testified that parks of this type are not intended to serve a local area, but perform an island-wide function. They must be acquired through use of public funds, rather than exacted as a condition of local development. There simply was *no* "reasonable nexus" between this resort development and the exaction of a *regional* park, and the City's entire course of conduct was flagrantly unlawful.

3. The Bishop Estate's *Nollan* Claim Was Duly Raised Below.

Because of the startling statement in the opinion below that "Appellants failed . . . to specify at trial that they were pursuing a separate claim based on unconstitutional exaction" and thus the court below was said to lack a "factual record" (see Appendix B, pp. 10-11). Petitioners assure this Court that it simply isn't so. Petitioners did make a *Nollan* claim,[19] and did so by every method known to law: by pleadings, pretrial statements, arguments, briefing and evidence. All this was covered in a Petition for Rehearing, which in elaborate detail cited scores of record parts making it crystal clear that the *Nollan* claim was indeed *pursued throughout*. In fact, the *Nollan* issue was raised by the City itself. In the words of the City's trial counsel:

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[19] Indeed, they did so starting with their pleadings even before the *Nollan* case came down. See 649 F. Supp. at 929-930. They relied on *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) whose holding correctly anticipated *Nollan* and prohibited exactions absent a rational nexus. *Parks* was ignored below.

> "And the claim was that Mr. Winquist established City policy to extract [*sic*] a park. *The evidence will show that is not the case.*" [RT 8-100:16-18, emphasis added].

Also, as Verne Winquist, Honolulu's senior planner, put it:

> "The City's key element in East Hawaii Kai is a 'gift' of an eighty to hundred acre park at Queen's Beach or [*sic*] 75-100 acres size . . . We should use possibility of 13 acres LDA [low density apartments] and 17 acres MDA [medium density apartments] as trading chips to *force* KACOR/Bishop to give us Queen's Beach park." (Emphasis in the original) [Winquist being quoted — depo. of Connell, Ex. 8, ER 1193].

Ramon Duran, the City's Deputy Parks Director, testified in deposition that the City's demand was "blackmail." At trial, he tried to make a joke out of it (RT 15-41 - 15-42). But the jury was never permitted to pass on the bona fides of this "joke" because the District Court entered a directed verdict for the defense.

Winquist adhered to this position even *after* this Court decided *Nollan,* and testified:

> "It's commonly done, as you know, counselor. If developers come in for development, why the City tries to maximize the public advantages by getting goodies for the public; parks, school sites, roads, sewers." [RT 17-

126:2-5.][20]

If anything, the issue arose in an aggravated form. Exaction demands are normally made under local ordinances that authorize and circumscribe them. Honolulu, however, at first had no such ordinance, and after adopting one, flouted its provisions. Thus, the "dedication" demands were devoid of *any* lawful authority; they were simply *ad hoc* extortion demands.

The *Nollan* impermissible exaction issue was plainly raised below from the outset and was maintained throughout. The contrary assertion in the Opinion below is in error.

REASONS WHY THE WRIT SHOULD ISSUE

INTRODUCTION

To characterize as chaos the lower courts' takings decisions, and the hoops an aggrieved land owner must jump through to get judicial relief, would be to flatter

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20 A municipal policy of *always* exacting "goodies" irrespective of the presence of a nexus is clearly illegal (*see Nollan*, 483 U.S. at 833, n. 2). The city all but conceded that its policy is to flout *Nollan's* constitutional criteria:

> "THE COURT: Mr. Duran, you *always* try to get it free if you can, don't you?
>
> "THE WITNESS: Oh, absolutely sure . . ."
> (RT 15-46, emphasis added).

Evidently emboldened by the courts' failure to curb such practices, Honolulu has since announced that it will henceforth demand $100,000,000 (that's no misprint: one hundred million dollars) as "up front money" before anyone will be permitted to develop a golf course. See Appendix F. Some "goodies."

the situation. Pertinent law has become a puzzle to judges[21] and commentators[22] alike.

The case at bench is an unfortunate example of just how far things have come in the Ninth Circuit. In spite of an extensive uncontradicted record of brazen municipal demands for huge extra-legal tribute before *any* approval would be granted for perfectly lawful use of Petitioners' land, the court below simply asserted that Petitioners did not raise the *Nollan* issue, when they plainly did by every method known to law.

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[21] See, *e.g.*, the District Court's struggle at bench — 649 F. Supp. at 941, n. 18; *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 671 [4] (D.C. Va. 1985).

[22] *See* Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (Sept. 1990); Mandelker and Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use & Zoning Digest 3 (Jan. 1990); Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zoning & Planning Law Report 57 (Sept. 1988); Mandelker and Blaeser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49 (Jul. - Aug. 1988). This is the most informed segment of expert opinion. Prof. Kmiec is a former high Justice Department official and author of a land-use law book; Prof. Mandelker is a prolific author and leading land-use academic (who describes himself as a "police power hawk"); Mr. Berger, also a prolific commentator, is the leading practitioner in the regulatory inverse condemnation field, who represents land owners; Mr. Blaeser is a commentator and practitioner who has represented both land owners and regulators. *See* Blaeser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop.L.J. 73 (1988). The fact that such a highly knowledgeable, diverse group should reach unanimity as to prevailing confusion in the law and the need for reform deserves thoughtful consideration by this Court.

Also, the court below simply ignored this Court's discussion in *Agins v. City of Tiburon,* 447 U.S. 255, 263, n. 9 (1980) on liability for "condemnation blight," and announced a "rule" that is at odds with widely prevailing law, common sense, and indeed with prior law of the Ninth Circuit itself.

Intervention by this Court is urgently needed to restore a modicum of clarity and intellectual integrity to the pertinent law.

I.

PETITIONERS HAVE BEEN SUMMARILY STRIPPED OF THEIR DUE PROCESS RIGHT TO ADJUDICATION OF THEIR CONSTITUTIONAL RIGHTS UNDER THE *NOLLAN* RULE.

A. Petitioners Made Out An Overwhelming Case Of Entitlement To Relief Under *Nollan v. California Coastal Commission,* But Were Deprived Of Their Substantive Constitutional Rights As Well As Due Process When The Court Below Simply Asserted That They Failed To Raise This Issue When They Repeatedly Did By Every Means Known To The Law.

Petitioners have endured in the court below an experience of Orwellian proportions. Beginning with their pleadings, they have throughout sought relief for what this Court in the *Nollan* case aptly termed an out-and-out plan of extortion. They not only failed to receive relief

to which they were clearly entitled,[23] but the court below added insult to injury by the assertion that they failed to raise the issue when they plainly did.

This appalling injustice is aggravated here because there was not even a pretense of a rational nexus determination nor even compliance with any municipal ordinance. The evidence of the City's extortionate conduct was overwhelming, and on this record is undisputed. This case goes far beyond *Nollan*; there, at least, the regulators tried to conjure up far-fetched visions of "psychological barriers" and such (483 U.S. at 838). Here, however, they openly saw the process not as a legitimate means of ameliorating adverse effects of proposed development,[24] but as an opportunity for extra-legal gain (*i.e.*, "blackmail," "getting goodies,"

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[23] Please recall the many instances in which Honolulu officials conceded that their purpose in denying *all* land-use approvals for private use of Queen's Beach, was to acquire gratis 80 acres of beach (worth $100,000,000). Our research discloses no case in which public officials were so audacious. *Roth v. State Highway Comm'n.*, 688 S.W.2d 775 (Mo. App. 1985), comes close, but there judicial relief was granted. This is an unblushing act of extortion. For its pragmatic sequel, see Appendix F, and reflect on whether those brazen demands for municipal *baksheesh* that in sheer size beggars the imagination of banana republic dictators, are from now on to be acceptable American municipal behavior.

[24] None were ever articulated. Please recall the undisputed evidence that the Hawaii Kai area is already disproportionately endowed with a wealth of parks, far beyond the needs of its population so that the would-be Queen's Beach park would be regional, not one serving Hawaii Kai. It is clear that the Bishop Estate was singled out for this "blackmail" (as Duran put it) simply because its development applications for eastern Hawaii Kai made it a convenient target. It seems appropriate to recall the *bon mot* of America's erstwhile premier bank robber, Willie Sutton, who, when asked why he robbed banks, responded: "Because that's where the money is." *See particularly Nollan*, 483 U.S. at 836, n. 4.

"bargaining chips," and "always [*sic*] try[ing] to get it for free.").

As this Court put it in *Nollan*: "The purpose [of the demanded exaction] then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them." It is rather "out-and-out extortion" (483 U.S. at 837). And so it is here.

B. In The Event This Court Finds The Treatment Of The *Nollan* Issue In The Opinion Below Insufficient To Warrant Review On The Merits At This Level, The Case Should Be Summarily Remanded For Consideration Of That Issue By The Court Below.

The assertion below that a *Nollan* claim was not presented is wholly unjustified. Bishop Estate has thus been literally stripped of its due process right to a minimally rational adjudication of its claims whose very existence was wrongly denied by the Court of Appeals. Petitioners were thus denied any semblance of due process.

Large interests and important constitutional rights are at stake here. It is fundamentally unfair and ultimately frightening that such a fate can befall a litigant in the United States Court system. If constitutional rights can be so casually snuffed out by a baseless assertion that a claim of relief was not raised, when it plainly and repeatedly was — by every procedural device known to American law — then no constitutional rights, property or otherwise, are safe.

The need for intervention by this Court is imperative. At the very least, the decision below should be summarily vacated and the court below directed to decide the *Nollan* issue which was plainly before it. *See e.g., Eckerd Drugs, Inc. v. Brown,* 457 U.S. 1128 (1982); *Lane v. Smith,* 457 U.S. 1102 (1982).

II.

BY ASSERTING THAT IN PRECONDEMNATION BLIGHT CASES THE STANDARD OF TAKING IS THE SAME AS IN REGULATORY TAKING CASES, THE COURT BELOW HAS CONFOUNDED A CENTURY OF AMERICAN LAW AND IGNORED THIS COURT'S "GOOD FAITH" STANDARD ARTICULATED IN *AGINS v. CITY OF TIBURON*

A. Claims Of Takings Accomplished By Precondemnation Blight Implicate An Inquiry Into Governmental Lack Of Good Faith.

In *Agins v. City of Tiburon,* 447 U.S. 255 (1980), this Court articulated two disjunctive criteria of a non-physical taking: the regulation effects a taking ". . . if the ordinance does not substantially advance legitimate state interests [citation], *or* denies an owner economically viable use of his land [citation]." (447 U.S. at 260, emphasis added). Thus, if the ostensible regulation does not advance "legitimate state interests" and the owner has suffered deprivation of a substantial property right, one need go no further. Deprivation of property rights for illegitimate reasons is sufficient to establish a taking of those rights on this prong of the *Agins* test alone.

More importantly, turning from ordinary regulations to precondemnation blight, *Agins* went on (447 U.S. at 263, n. 9) to stress that whether precondemnation activities rise to the level of an actionable taking, implicates an inquiry into the would-be condemnor's "good faith planning activities" whose presence vitiates liability. But absent good faith, the issue of *de facto* taking is open,[25] and municipal good faith raises a jury issue. *Bello v. Walker*, 840 F.2d 1124, 1129-1130 (3rd Cir. 1988). Moreover, this Court has held repeatedly that value-altering conduct that is a prelude to condemnation, violates the Constitution; *see United States v. Reynolds*, 397 U.S. 14, 15-16 (1970); *United States v. Virginia Elec. Power Co.*, 365 U.S. 624, 625 (1961). Such conduct cannot possibly constitute pursuit of "legitimate state interest" within the meaning of *Agins* — quite the contrary. Nor can a city even claim to be acting in "good faith" in violation of the Constitution; *see Owen v. City of Independence*, 445 U.S. 622, 649-650 (1980).

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[25] Unaccountably, the court below completely ignored this aspect of *Agins*, and treated the issue as identical with good faith regulation. But if the criteria of taking by precondemnation blight (effected by market value manipulation, or outright extortion, as here) are no different than those of good faith regulation — as asserted by the court below — then why would this Court go out of its way to treat the two differently, as it did in *Agins*?

B. The Opinion Below Confounds The Widely Prevailing Law Holding That Deliberate Value-Depressing Precondemnation Activities Are Constitutionally Illegitimate And As Such Are Not Judged By The Same Standards As Good Faith Regulation.

Taking criteria must be distinctly different in cases of good faith regulation, as opposed to bad faith evasions of the Just Compensation Clause (that seek to diminish value of land targeted for acquisition and prevent its private use[26]). This is so because in the former mode of action the government seeks to further public health, safety, welfare and morals, while in the latter mode it sets out to violate the Fifth Amendment. Thus, in a good faith, legitimate regulation context the property owner retains some economically viable use, so there is no taking. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1979), unless even proper regulation goes too far. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), *First English, etc., Church v. County of Los Angeles,* 482 U.S. 304 (1987).

But this is not true where the ostensible "regulation" is an effort to subvert the Just Compensation Clause. It is one thing to say that reasonable, good-faith regulations may impose burdens of citizenship in the form of somewhat reduced values (*i.e.*, what Justice Holmes called the petty larceny of the police power). It is quite another to suggest that governmental bad faith overtly

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[26] Please recall (see pp. 10-11 *ante*) that when the issue of a possible consensual purchase of Queen's Beach by Honolulu came up, the City's response was that regulations have so adversely impacted the utility of Queen's Beach that nothing would be offered for it.

calculated to subvert an express constitutional guarantee is equally a burden to be borne without judicial redress or even meaningful review. That would not leave much of the Just Compensation Clause as well as other constitutional guarantees. As the Court aptly put it in *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 274 (Tex. Civ. App. 1975), when the government puts its thumb on the scale to diminish utility and value of land it means to acquire, it is no longer governing, but trying to take unfair advantage of those whom it pretends to govern. It is then not entitled to judicial deference to its actions, nor can it shield its true motives from judicial scrutiny. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) [improper motivations of municipal land-use regulators must be inferred, since they are not likely to be openly made of record].

Courts have, of course, readily seen through such governmental masquerades in a variety of factual settings. This is in the mainstream of pertinent American law.[27] It is no more than Justice Frankfurter's

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[27] *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959) [ostensible flight regulations used to deny access to remote land targeted for acquisition]; *Drakes Bay Land Col. v. United States*, 424 F.2d 574 (Ct. Cl. 1970) [federal government involvement in local land use approval process, preventing the owner from developing land slated for acquisition]; *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977) [same]; *Roth v. State Highway Comm'n.*, 688 S.W.2d 775 (Mo. App. 1985) [denial of land-use permit as leverage against land owner to force a below-market sale]; *San Antonio River Auth. v. Garrett Bros., supra*, 528 S.W.2d at 266 [denial of land-use permit to cheapen government land acquisition]; *Keystone Associates v. State*, 333 N.Y.S.2d 27 (App. Div. 1972); *aff'd.*, 33 N.Y.2d 848, 307 N.E.2d 254 (N.Y. 1973) [denial of demolition permit to facilitate condemnation of New York's old Metropolitan Opera House]; *City of Sparks v. Armstrong*, 748 P.2d 7, 8-9 (Nev. 1987) [approval of subdivision on condition that development of land targeted for

(continued)

observation that the Constitution protects citizens from sophisticated as well as simple minded schemes (*Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In other words, in an honest regulatory context, some economically viable use of property must be permitted, and the owner gets to enjoy it. But in the acquisitory context the government is not regulating, but rather giving itself an unfair advantage by setting up the ostensibly "regulated" property for ultimate acquisition at less than its fair market value. Thus the deprivation of substantial private rights is then merely an attempt to deny the owners lawful use of their own property to soften them up for the coming condemnation. The ostensible "regulation" is then no regulation, but a charade that subverts the constitutional mandate to pay "just compensation." To say, as did the courts below, that an acquisition-minded municipality can toy with a land owner for years by holding out possibilities of use that just "might" be granted, and then argue that it did not prevent *all* use, would be to mock the Constitution. The

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(ftn. continued)
acquisition be prohibited]; *Lange v. State*, 547 P.2d 282 (Wash. 1976) [disruption of ongoing subdivision process by state's announced acquisition plans]; *Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794, 801 [6] (Wis. 1980) [city refusal to relicense theater to facilitate its cheaper acquisition for redevelopment]; *Jones v. People ex rel. Dept. of Transp.*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978) [denial of subdivision approval to facilitate planned acquisition of freeway right-of-way]; *Tilem v. City of Los Angeles*, 142 Cal.App.3d 694, 191 Cal.Rptr. 229 (1983) [preventing land owner for 3 years from developing his land to facilitate city's acquisition plans]; *United States v. Certain Lands in Truro, etc.*, 476 F. Supp. 1031 (D. Mass. 1979) [zoning regulation drafted so as to diminish land values in planned acquisition for park]; *Peacock v. County of Sacramento*, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (1969) [land use forbidden pending airport siting study].

same is true *a fortiori* where the government overtly tries to engage in something-for-nothing acquisitory activity by demanding, without any required *Nollan* nexus, that the owner "dedicate" land before land-use approval is granted; see the numerous state court authorities collected by this Court in *Nollan, supra,* 483 U.S. at 839-840, which readily demonstrate that this is the prevailing rule.

C. Where Deliberate Precondemnation Value-Depressing Government Activities Deprive The Property Owner Of Substantial Property Rights (Particularly The Right Of User — The Most Important Property Right Of All), A Taking Results.

The rule reflected in the above subheading was expressed in *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14 (1984). Also see *ante,* n. 27. Not much can be added to it, except to note that, as this Court emphasized in *Kirby,* the government is free to take private land, or not to take it. But it is *not* free to "reserve" it for future acquisition.[28] It may not compel a land owner to refrain from using land until such time as the government gets good and ready to acquire it (see 467 U.S. at 15). *A fortiori,* it may not manipulate the land-use approval process to frustrate perfectly legitimate uses, and *a fortiori* again, it may not extort "donation" of the targeted land. *Nollan, supra,* 483 U.S. at

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[28] That proposition has been settled law ever since the American first impression case, *Forster v. Scott,* 32 N.E. 976 (N.Y. 1893). For its most recent application, *see Joint Ventures, Inc. v. Department of Transportation,* 563 So.2d 622 (Fla. 1990).

833, n. 2 (the right to build on one's land is not a "governmental benefit" and hence a municipal announcement that a permit will entail the yielding of a property interest cannot pass constitutional muster).

The court below disregarded all that, and thereby confounded the law. It put clear violations of the Constitution on the same footing as good faith regulations.

III.

WHEN THE NINTH CIRCUIT CONSTRUED THE *WILLIAMSON COUNTY* HOLDING (REQUIRING PLAINTIFFS IN INVERSE CONDEMNATION CASES TO SUE FIRST IN THE STATE COURTS IF "... REASONABLE, CERTAIN AND ADEQUATE ..." REMEDIES ARE AVAILABLE THERE), AS REQUIRING SUCH PRELIMINARY STATE COURT LITIGATION EVEN WHERE STATE REMEDIES ARE UNAVAILABLE OR UNCERTAIN, IT CONFOUNDED THE LAW AND IMPOSED A NEEDLESS DOUBLE BURDEN ON THE COURTS AND PARTIES.

A. At The Time This Action Was Filed, There Were No Inverse Condemnation Remedies In The Hawaii Courts.

In *Williamson County Regional Planning Comm'n. v. Hamilton Bank* 473 U.S. 172 at 194-195 (1985), this Court held that to satisfy the first (denial of just compensation) prong of the ripeness test, the aggrieved property owner must first seek "just compensation" from the state courts, *provided* the state law offers a "... reasonable,

certain and adequate . . ." inverse condemnation remedial process (*Id.* at 194, emphasis added). A plaintiff is not required to pursue an unfair, conjectural, piecemeal process to vindicate the violated Constitutional rights; *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 348, 350, n. 7 (1986).

But the Ninth Circuit has turned its back on these holdings with reference to Hawaii, and has it that even where it is conceded that that state inverse condemnation remedies are uncertain, the aggrieved land owner must nonetheless pursue them before the case is "ripe."[29] Thus, instead of being assured of *adequate and certain* substantive and procedural safeguards to vindicate constitutional rights, the aggrieved party is challenged to show the concededly uncertain state procedures to be "certain" within the meaning of *Williamson County.* That not only stultifies this Court's holdings, but is also unjust and inefficient in the extreme. Indeed, it creates conflict with existing Ninth Circuit law (*Herrington v. County of Sonoma,* 834 F.2d 1488 (9th Cir. 1987)).

Actually, this horror story is even worse than that because at the time this action was brought (*i.e.,* before this Court decided *First English*) Hawaii courts did not permit an action in inverse condemnation seeking just compensation for takings effected by precondemnation blight (*see City & County of Honolulu v. Chun,* 54 Haw. 287, 288-289, 506 P.2d 770, 773 (1973)). In fact, Hawaii at that time did not even permit an action for just compensation *for physical seizure* of privately owned land. *See Honolulu Memorial Park, Inc. v. City & County of Honolulu,* 50 Haw. 189, 194, 436 P.2d 207, 211 (1967), and *compare Loretto v. Teleprompter*

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[29] *See Lai v. Honolulu,* 841 F.2d 301, 303 [3] (9th Cir. 1988) — even though the defendant city conceded uncertainty of state remedies, plaintiff held required to pursue them anyway.

Manhattan CATV, 458 U.S. 419 (1982). Thus, an inverse condemnation lawsuit in the Hawaii state courts at that time would have been a grotesque waste of time, effort and resources.

IV.

HAVING TO SEEK FURTHER CITY APPROVALS TO ACHIEVE "RIPENESS" WOULD HAVE BEEN AN EXERCISE IN UTTER FUTILITY BECAUSE THE CITY THROUGHOUT WAS ADAMANT THAT NO APPROVALS WOULD BE GRANTED WITHOUT AN EXTORTED "GIFT" OF QUEEN'S BEACH.

To the extent the District Court found (649 F. Supp. at 942) the case unripe on the second prong of the *Williamson County* test (*i.e.*, a "final" determination of permitted uses — see 473 U.S. at 193-194) it compounded the horror story before it. First, the City made it clear throughout that it would not permit *any* private land uses *unless Queen's Beach was "donated."* Thus, for the Bishop Estate to have to seek for the eighth time permission to use its own land, this time for uses that its best judgment and expert advice showed to be economically infeasible, goes beyond all bounds of reason.[30] Since the City made it absolutely clear that *no* use would be permitted without the "gift," a quest for more "uses" —- where resort, residential, commercial and industrial

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[30] *See* Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules For Land-Use Planning*, 20 Urb. Law. 735, 792-793 (1988), citing the District Court's opinion in this case as exemplary of meaningless distortion of this Court's ripeness rules.

had already been rejected — would have been a grotesque charade.

How many times must a land owner beat his head against a brick wall before this Court will say "enough"? How many "combinations of uses"[31] must be pursued in vain? *A fortiori* so when the standard the District Court set up for such a will o' the wisp quest was whether the City "might" [*sic*] permit some such uses (see 649 F. Supp. at 942). Does the Constitution rest on no firmer reed than such municipal whim?[32]

By affirming such results, the court below went counter to the *Williamson County* and *MacDonald, Sommer & Frates* ripeness rules, causing confusion in the law. It also inflicted a terrible injustice.

CONCLUSION

What is before the Court is a true legal horror story. Whether by the standard of importance of the constitutional issues, or the large interests involved, or the imperative demands of the most elemental notions of justice, relief is plainly called for.

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[31] Obviously, a "combination of uses" test goes beyond the bounds of rationality. There are literally countless "combinations" that one might propose. Must a land owner then apply for them, one by one, with the City sitting there free to reject them seriatim, as it in fact did here more than a half-dozen times?

[32] *See e.g.*, Morgan, *Municipal Responses to the Supreme Court's New Regulatory Taking Opinions*, 39 Land Use & Zoning Digest 3, 5 (1987), cynically advising municipal regulators to avoid a "final" conclusion on permissible land uses.

Petitioners respectfully pray that the Writ issue and that thereupon:

(a) the decision below be reversed, or in the alternative,

(b) the decision below be summarily vacated and the cause remanded for consideration of Petitioners' *Nollan* issue which — contrary to the statement in the opinion below — *was* duly raised and tendered for decision.

Respectfully submitted,

GIDEON KANNER
Counsel of Record

CROSBY, HEAFEY, ROACH
& MAY

G. RICHARD MORRY
CHERYL A. NAKAMURA

RUSH, MORE, CRAVEN,
SUTTON, MORRY & BEH

Attorneys for Petitioners

APPENDIX A

KAISER DEVELOPMENT COMPANY,
aka Kacor Development Company, a California corporation; Kaiser Hawaii Kai Development Co., a Nevada corporation, Plaintiffs,

and

Richard Lyman, Jr.; Matsuo Takabuki;
Myron B. Thompson; William S. Richardson;
Henry H. Peters, Jr., Plaintiffs/Intervenors-Appellants,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,
Defendant-Appellee.

KAISER DEVELOPMENT COMPANY
aka Kacor Development Company, a California corporation; Kaiser Hawaii Kai Development Co., a Nevada corporation, Plaintiffs-Appellants,

and

Richard Lyman, Jr.; Matsuo Takabuki;
Myron B. Thompson; William S. Richardson;
Henry H. Peters, Jr., Plaintiffs/Intervenors,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,
Defendant-Appellee.

Nos. 87-2689, 87-2690.
United States Court of Appeals,
Ninth Circuit.

Nos. 87-2689, 87-2690.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 16, 1988.
Decided March 21, 1990.

Barbara R. Banke and Jess S. Jackson, San Francisco, Cal., for plaintiffs-appellants.

Gideon Kanner, Burbank, Cal., for plaintiffs-intervenors.

H. Bissell Carey, III and Steven L. Richards, Robinson & Cole, Hartford, Conn., for defendant-appellee.

Mary Gray Holt, Gail Ruderman Feuer, Deputy Attys. Gen., Los Angeles, Cal., for amici curiae; John K. Van de Kamp, Atty. Gen. for the State of Cal.

Appeal from the United States District Court for the District of Hawaii; Samuel P. King, District Judge, Presiding.

Before CHAMBERS, O'SCANNLAIN and TROTT, Circuit Judges.

The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu,* 649 F.Supp. 926 (D.Haw.1986). We conclude that no other cases decided since the date of that decision change the validity of Judge King's reasoning or the result in this appeal. Among the cases we have considered are *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398 (9th Cir.1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990); *Hoehne v. County of San Benito,* 870 F.2d 529, 533 (9th Cir.1989); *Lai v. City and County of Honolulu,* 841 F.2d 301 (9th Cir.1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 560, 102 L.Ed.2d 586 (1989); *Shelter Creek Dev. Corp. v. City of Oxnard,* 838 F.2d 375 (9th Cir.1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 134, 102 L.Ed.2d 106 (1989); *Herrington v. Sonoma County,* 834 F.2d 1488 (9th Cir.1987), *modified,* 857 F.2d 567, *cert. denied,* ___

U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Lake Nacimiento Ranch v. San Luis Obispo County,* 830 F.2d 977 (9th Cir.1987), *cert. denied,* ___ U.S. ___, 109 S.Ct. 79, 102 L.Ed.2d 55 (1989); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449 (9th Cir.1987), *modified,* 830 F.2d 968, *cert. denied,* 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.861 (1988); *Uffman v. Housing Finance and Development Corp.,* 760 P.2d 1115 (Hawaii 1988).

Our decision in the appeal from the directed verdict will be filed separately in an unpublished memorandum.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

and

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.,

Plaintiffs/Intervenors-Appellants,

v.

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

No. 87-2689

D.C. No. CV-84-0389-SPK

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs-Appellants,

and

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.,

Plaintiffs/Intervenors,

v.

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

No. 87-2690

D.C. No. CV-84-0389-SPK

ORDER AND OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
November 16, 1988—Honolulu, Hawaii

Memorandum Filed March 21, 1990
Order and Opinion Filed September 4, 1990

Before: Richard H. Chambers, Diarmuid F. O'Scannlain, and Stephen S. Trott, Circuit Judges.

Per Curiam

SUMMARY

Constitutional Law/Land Use and Zoning

Affirming a judgment on a directed verdict, the court of appeals held that a city's precondemnation zoning activities was not a "taking" of property in violation of the fifth amendment.

The court denied the petitions for rehearing and rejected the suggestions for rehearing en banc. The court made numerous changes to its previous memorandum filed March 21, 1990 and redesignated its previous memorandum as a per curiam opinion for publication.

Appellants, the Trustees of the Estate of Bernice P. Bishop (Bishop), entered into an oral agreement with Kaiser Development Company to develop land in Honolulu, a portion of which included land known as Queen's Beach. Kaiser developed most of the property into an urban community, and expected to build a a resort/hotel complex at Queen's Beach. Although in 1960, the General Plans of the City of Honolulu designated Queen's Beach as a resort and commercial area, in 1984 Queen's Beach was zoned for preservation and park use. In 1983, Kaiser applied for aproval of a residential subdivision at Queen's Beach to conform with the existing residential zoning. The City of Honolulu denied the application after passage of its Development Plan later that year. The denial was upheld by the zoning board of appeals. Kaiser made no subsequent attempt to apply for development permits, zoning changes, or variances at Queen's Beach under the new preservation and park zoning. The district court granted summary judgment for Honolulu on all but one of the claims brought by Kaiser and Bishop. Bishop's claim of inequitable precondemnation activities proceeded to trial. At the close of Bishop's evidence, the district court granted a directed verdict in favor of Honolulu.

[1] The court recognized that in some limited circumstances, a city's precondemnation activities can give rise to a takings claim in favor of a property owner. [2] Although Bishop alleged that the district court applied the wrong legal standard in determining whether it had presented sufficient evidence to support its inequitable condemnation activities claim, the district court determined that such a claim required proof that there was "no economically viable use" for the property. [3] The court noted that Supreme Court precedent unequivocally indicates that the government does not take an individual's property unless it has denied him an economically viable use of his land. In the absence of an interference with the owner's right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the fifth amendment. [4] The district court did not abuse its discretion in properly excluding evidence as not relevant to the inequitable precondemnation activities claim. The court properly focused on what was done to the particular property in connection with the application, and not what lower city officials discussed in private. [5] The court did not rule on Bishop's claim of unconstitutional exaction. Bishop failed to specify at trial that it was pursuing a separate claim on this basis. The court had no factual record to assist it in ruling on this claim.

COUNSEL

Barbara R. Banke, San Francisco, California, for the plaintiffs-appellants.

Gideon Kanner, Burbank, California, for the plaintiffs/intervenors-appellants.

H. Bissell Carey, III, Robinson & Cole, Hartford, Connecticut, for the defendant-appellee.

ORDER

The memorandum filed on March 21, 1990 is amended as follows:

page 2, line 14, delete "and Kaiser Development Company ("Kaiser")"

page 2, line 16, delete "Kaiser and"

page 2, line 17, delete "their" and insert "its"

page 2, line 20, insert "Development Company ("Kaiser")" after "Kaiser"

page 4, line 8, insert "'s" after "Bishop" and delete "and Kaiser's"

page 4, line 10, delete "Kaiser and"

page 4, line 12, delete "Kaiser and" and "joint"

page 5, line 7, delete "Kaiser and" and add an "s" to the end of "allege"

page 5, line 12, delete "Appellants" and insert "Bishop", add an "s" to the end of "contend", and delete "they" and insert "it"

page 6, line 15, delete "Kaiser and" and insert "s" after "argue"

page 7, line 8, delete "appellants" and insert "Bishop" and insert "s" after "question"

page 7, line 13, delete "Appellants" and insert "Bishop" and delete "they" and insert "it"

page 7, line 14, delete "were" and insert "was".

As amended, the memorandum is redesignated as a per curiam opinion for publication.

The panel has voted to deny the petitions for rehearing. Judges O'Scannlain and Trott have voted to reject the suggestions for rehearing en banc, and Judge Chambers so recommends.The full court has been advised of the en banc suggestions, and no judge of the court has requested a vote on them.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

OPINION

PER CURIAM:

We are asked to decide whether the district court erred in granting the City and County of Honolulu's ("Honolulu") motion for a directed verdict against the Trustees of the Estate of Bernice P. Bishop ("Bishop"). The district court ordered a directed verdict after determining that Bishop had failed to produce sufficient evidence to support its inequitable precondemnation activities claim against Honolulu. We affirm.

I

In 1961, Bishop entered into an agreement (the "development agreement") with Kaiser Development Company ("Kaiser") to develop 6,000 acres of land in Honolulu, a portion of which includes a parcel known as Queen's Beach. Kaiser developed most of the property into a new urban community known as Hawaii Kai. Kaiser expected to build a large

resort/hotel complex at Queen's Beach, asserting that it considered this project its "crown jewel" and economic reward for having developed the vast Hawaii Kai community. Kaiser spent over $8 million in building the Hawaii Kai infrastructure to accommodate the anticipated resort/hotel development, but made no attempt to develop Queen's Beach until 1971.

The 1960 and 1964 General Plans for the long range development of Honolulu, adopted pursuant to the Honolulu City Charter, designated Queen's Beach as a resort and commercial area. Queen's Beach also was designated as a resort and commercial area in both the 1964 and 1966 Detailed Land Use Maps ("DLUM"), which were adopted for numerous areas of Honolulu to accompany the General Plan.

In 1977, a new General Plan became effective which also listed Queen's Beach as a potential resort site. In 1982, however, a revised General Plan modified the population densities and removed the designation of the area as a future resort site. In 1983, the City enacted the East Honolulu Development Plan (the "Development Plan") which changed the previous DLUM resort designation of Queen's Beach to one of preservation and park uses.

The history of these plans is somewhat confused because the zoning codes were not updated when each new General Plan was adopted. From 1960 to 1969, Queen's Beach was zoned residential. This zoning remained in effect until 1984, when Queen's Beach was zoned for preservation and park use.

In 1971, Kaiser applied to have its Queen's Beach property rezoned from residential to resort in accordance with the 1964 and 1966 DLUMs, but Kaiser later withdrew the request. In February 1983, Kaiser applied for approval of a residential subdivision at Queen's Beach in conformity with the existing residential zoning. The city denied the applica-

tion after the passage of the Development Plan later that year. The denial was upheld by the zoning board of appeals. Kaiser made no subsequent attempt to apply for development permits, zoning changes, or variances at Queen's Beach under the new preservation and park zoning.[1]

Kaiser and Bishop brought this suit against Honolulu under 42 U.S.C. § 1983. Honolulu moved for summary judgment. The district court granted summary judgment in favor of Honolulu on all but one of the claims before the court;[2] Bishop's claim of inequitable precondemnation activities proceeded to trial. At the close of Bishop's evidence in support of its claim, the district court granted a directed verdict in favor of Honolulu.

We here consider Bishop's appeal from the directed verdict. A directed verdict is proper where the evidence permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1126 (1986).

II

[1] This court recognizes that, in some limited circumstances, a city's precondemnation activities can give rise to a takings claim in favor of a property owner. In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), for instance, we found that a municipal redevelopment agency's activities effected a compensable taking under the fifth and fourteenth amendments to the United States Constitution. The property had been "rendered unsaleable in the open market; its uses were

[1]This zoning allows for a variety of uses. For instance, the zoning permits the land to be used for fish hatcheries and ponds, forests, game preserves, private golf courses, botanical gardens, cemeteries, and camps.

[2]This decision has been affirmed in *Kaiser Development Co. v. Honolulu*, Nos. 87-2689, 87-2690, slip op. 2983 (9th Cir. March 21, 1990).

severely limited by [the] Agency; commercial lenders refused to make loans on the subject property; and [the property owner's] peaceful enjoyment and its right to all rents and profits from the property were substantially impaired." *Id.* at 1331.

[2] Bishop alleges that the district court applied the wrong legal standard in determining whether they had presented sufficient evidence to support their inequitable precondemnation activities claim. The district court found that such a claim requires proof that there is "no economically viable use" for the land. Bishop contends that it need show only that "a public entity acting in furtherance of a public project directly and substantially interfere[d] with property rights and thereby significantly impair[ed] the value of property." *Richmond Elks*, 561 F.2d at 1330; *see also Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983).

[3] We disagree. A cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has " 'denie[d] [him] economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). "[I]n the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984).

Under this standard, it is clear to us that the directed verdict was proper. At trial, Bishop presented two expert witnesses who testified to the value of Queen's Beach under existing zoning. One witness gave extensive testimony regarding the permitted use of a golf course. He stated that a private

golf course would be economically viable, albeit not as profitable as a resort development. Another witness testified that it would not be "economic" to purchase the property under the current zoning except "perhaps" for speculation. We agree with the district court that the evidence permitted only one reasonable conclusion as to the verdict.[3] *See Peterson*, 771 F.2d at 1256.

Bishop also argues that the district court abused its discretion in excluding certain evidence at trial. *See Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988)) (court of appeals reviews district court's ruling on evidentiary questions for abuse of discretion only). They charge that the district court erred by excluding certain testimony of Deputy Parks Director Ramon Duran and City planner Verne Winquist as well as other evidence, including a chart and exhibits.

[4] We disagree. The district court properly excluded this evidence as not relevant to the inequitable precondemnation activities claim. The court properly focused on "what was done with this particular property in connection with the applications . . . and not what they [*i.e.*, the city officials] discussed in the back room on a lower level." *See* Reporter's Transcript at 151 (July 7, 1987).

[5] Finally, Bishop questions whether the City's alleged attempt to exact a 37-acre park in 1973-75, its alleged exaction of an 80-acre parcel of land in 1983-84, and its redesignation of Queen's Beach from "resort" to "park and preservation" use, constituted "unconstitutional exactions." *See Nollan*, 483 U.S. at 838-42. Bishop failed, however, to specify at trial that it was pursuing a separate claim based on

[3]Because we find that Bishop did not offer any substantial evidence that it had no economically viable use for its property, we need not decide if the City took "official action" here. *See Richmond Elks*, 561 F.2d at 1331 (acknowledging "official action" requirement for inequitable precondemnation claim and finding such action in that case).

unconstitutional exaction. We therefore have no factual record to assist us in ruling on this claim and hence do not reach this question. *See Commissioner v. McCoy*, 108 S. Ct. 217, 218-19 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KAISER DEVELOPMENT COMPANY, also known as KACOR DEVELOPMENT COMPANY, a California corporation, KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,
Plaintiffs,
vs.
RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, and HENRY H. PETERS, JR., Trustees of the Kamehameha Schools/Bishop Estate,
Plaintiffs/Intervenors,
vs.
CITY AND COUNTY OF HONOLULU, a municipal corporation,
Defendants.

CIVIL NO. 84-0389

DECISION AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

The Plaintiffs/Intervenors Trustees of the Estate of Bernice Pauahi Bishop, having rested at the close of the evidence offered by them, the Defendant City and County of Honolulu moves for a directed verdict. The

test for the court to apply to this motion is whether the evidence is such that, without considering the credibility of the witnesses or the weight of the evidence and viewing the evidence including all reasonable inferences therefrom most favorably to the Plaintiffs/Intervenors, there can be but one conclusion as to the verdict that reasonable jurors could reach. *California Computer Products, Inc. v. International Business Corp.*, 613 F.2d 727, 734 (9th Cir. 1979) ("[I]f there is no substantial evidence to support the claim, the court must direct a verdict."); *See also Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 853 n.2 ("evidence as a reasonable mind might accept as adequate to support a conclusion").

At times as the case proceeded, it has not been entirely clear whose complaint was being tried. The original complaint was filed by Kaiser Development Company (also Kacor Development Company) and Kaiser Hawaii Kai Development Co., on April 24, 1984. Plaintiffs/Intervenors filed a Complaint in Intervention on July 19, 1985. Their complaint tracked the original Kaiser complaint and in separate complaint which they had filed on May 9, 1984. *Lyman v. City and County of Honolulu*, Civ. No. 0449 (magistrate denied consolidation but granted intervention).

Defendant City and County of Honolulu brought motions for summary judgment on all claims by the original Plaintiffs and the Plaintiffs/Intervenors which motions this court decided in 1986. *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986). The court granted the Defendant's motions for summary judgment "on all causes of action except for Bishop's claims concerning inequitable precondemnation activities." 649 F. Supp. at 949.

The decision was quite specific. The Conclusion reads as follows:

> Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested

> rights to development at Queen's Beach, that plaintiffs' claims are not ripe for review under *Williamson County*; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

Id.

Notwithstanding this decision, the Plaintiffs/Intervenors offered evidence which this court allowed to be introduced before the jury but which had more relevance to the causes of action on which summary judgment in favor of the Defendant had been granted than to the remaining claims.

Inequitable precondemnation activities imply a related "taking" either by formal condemnation proceedings or by inverse condemnation. During the course of the trial, the court ruled on one aspect of this claim in connection with damages. That ruling was, in part, that:

> The due process claim, as I understand it, is based upon a "taking." Absent a 'taking,' any due process claim as I see it would be based upon the zoning regulation itself. The claims based upon over-regulation are no longer part of this case. Therefore, the Plaintiffs/Intervenors will have a § 1983 claim only if they prove their "taking" claim.

Order Regarding Expert Testimony on Damages at 3 (July 24, 1987).

As there has not been a formal condemnation proceeding, Plaintiffs/Intervenors' remaining claims depend upon a finding of a "taking" by inverse condemnation. Much evidence was introduced regarding actions and statements by individuals in the City administration and on the City Council. These actions and statements were

relevant to the interpretation of City policy but are not a substitute for official City policy. *Monell v. Department of Social Services,* 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati,* 106 S.Ct. 1292 (1986). In fact, the evidence has been clear that the executive branch and the legislative branch of the City were often taking opposing positions in regard to the development of Queen's Beach.

Official City action impacting on Queen's Beach was not taken until the new General Plan and the revised zoning were adopted by the joint action of the several departments and branches of the City. That action deleted the resort designation previously noted on portions of Queen's Beach, redesignated the area for preservation and park uses, and changed the zoning of Queen's Beach from R-6 to P-1 (later to P-2 but without significantly different allowable uses). More specifically, and for the purposes of this motion, we may assume that the City officially targeted some 80 acres at Queen's Beach for condemnation as a park within two to six years, of which three years have already passed.

Stated another way, the question is whether action by a municipality targeting an area for acquisition for public purposes with accompanying restrictive land use designations and zoning results immediately in an inverse condemnation prohibited by the federal Constitution as made applicable to the States through the fourteenth amendment and actionable under the Civil Rights Act, 42 U.S.C. § 1983, *et seq.,* and if not immediately then when if ever.

To prove a "taking," Plaintiffs/Intervenors must establish that pursuant to an intent to acquire Queen's Beach, the City engaged in unreasonable conduct which substantially interfered with the right to use the property. *Martino v. Santa Clara Valley Water District,* 705 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied,* 464 U.S. 847 (1983).

Plaintiffs/Intervenors have argued that the standard of "substantial interference" as set forth in *Martino* is something less than the standard of "no economically viable use" which is applicable in inverse condemnation cases based upon zoning regulations. *See, e.g., Nollan v. California Coastal Commission,* 55 U.S.L.W. 5145, 5147 (June 26, 1987); *Penn Central Transportation Co. v. New York City,* 438 U.S. 255, 260 (1980).

I reject this argument. While the legal theories differ as to what type of governmental activity may constitute a "taking," that does not change the *degree* of interference with constitutes a "taking" under the federal constitution. Reading *Martino* in the context of the United States Supreme Court cases on "taking," I read "substantial interference" as another term for "no viable economic use."

Plaintiffs/Intervenors have presented two expert witnesses who testified as to value under existing zoning. Mr. William Dornbush who gave extensive testimony regarding the permitted uses of golf course (private and public), testified that a private golf course would be economically viable although clearly not as profitable as resort development. (Testimony of July 28, 1987). Mr. Albert Schlarmann testified that it would not be "economic" to purchase the property under the current zoning, except "perhaps" for speculation. (Testimony of August 6, 1987).

Based upon the evidence presented, I find there has not been "substantial evidence presented that could support a finding . . . for the nonmoving party." *California Computer Products,* 613 F.2d at 734, *quoting Chisholm Brothers Farm Equipment Co.,* 498 F.2d 1137, 1140 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974). This does not mean that a municipality can designate an area for park indefinitely without instituting condemnation proceedings. While there must be some degree of freedom in the land use planning function, it is clearly established that the government can "go too far."

The land owner can force the issue by applying for permitted uses. If he is refused, he may then be able to show that he has been deprived of all use of his property. Absent such a refusal, the landowner must be able to establish that the permitted uses under existing zoning would not be economically viable. If the landowner determines that the zoning itself deprives him of all economically viable use, he can pursue a remedy for inverse condemnation based upon the regulation itself. This is the cause of action which in this case was earlier found to be not ripe under *Williamson County*. *See* 646 F. Supp. 926.

For the reasons and upon the grounds set forth above, the Defendant's Motion for Directed Verdict is HEREBY GRANTED. The Clerk is ordered to enter judgment dismissing the complaint.

SO ORDERED.

Dated: Honolulu, Hawaii, August 10, 1987.

/s/ Samuel P. King
United States District Judge

KAISER DEVELOPMENT, COMPANY, KAISER HAWAII KAI DEVELOPMENT CO., vs. LYMAN, *et al.*, vs. CITY AND COUNTY OF HONOLULU, a municipal corporation, CIVIL NO. 84-0389, DECISION AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KAISER DEVELOPMENT CO.,
also known as KACOR DEVELOPMENT
CORP., a California corporation,
KAISER HAWAII KAI DEVELOPMENT
CO., a Nevada corporation,
Plaintiffs,
and
RICHARD LYMAN, JR., MATSUO
TAKABUKI, MYRON B. THOMPSON,
WILLIAM S. RICHARDSON, and
HENRY H. PETERS, JR.,
Trustees of the Kamehameha
Schools/Bishop Estate,
Plaintiffs/Intervenors,
vs.
CITY AND COUNTY OF HONOLULU,
Defendant.

CIVIL NO. 84-0389

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

In accordance with its Decision on Motions for Summary Judgment filed on September 25, 1986, this court now enters its order as follows:

Defendant's motion for summary judgment against plaintiff Kaiser is HEREBY GRANTED for the reasons set forth in this court's decision of September 25, 1986, and all claims asserted by Kaiser are HEREBY DISMISSED.

Defendant's motion against plaintiff/intervenor Bishop Estate is GRANTED IN PART and DENIED IN PART for the reasons set forth in this court's decision of September 25, 1986. Bishop Estate will be allowed to pursue its claims for inequitable precondemnation activities under the fifth and fourteenth amendments.

SO ORDERED.

DATED: Honolulu, Hawaii, November 13, 1986.

/s/ Samuel P. King
United States District Judge

KAISER DEVELOPMENT CO., et al.,
v. CITY AND COUNTY OF HONOLULU,
CIVIL NO. 84-0389,
ORDER ON MOTIONS FOR SUMMARY JUDGMENT

APPENDIX E

KAISER DEVELOPMENT CO.,
also known as Kacor Development
Corp., a California corporation,
Kaiser Hawaii Kai Development Co.,
a Nevada corporation, Plaintiffs,
and
Richard Lyman, Jr., Matsuo
Takabuki, Myron B. Thompson,
William S. Richardson, and
Henry H. Peters, Jr.,
Trustees of the Kamehameha
Schools/Bishop Estate,
Plaintiffs/Intervenors,
v.
CITY AND COUNTY OF HONOLULU,
Defendant.

Civ. No. 84-0389.
United States District Court,
D. Hawaii.
Sept. 25, 1986.

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

SAMUEL P. KING, Senior District Judge.

Plaintiffs Kaiser Development Co. (Kaiser)[1] and plaintiffs/intervenors Bishop Estate (Bishop)[2] sued defendant City and County of Honolulu (City) for various actions taken by the City affecting a parcel of property known as Queen's Beach, which Kaiser and Bishop had sought to develop. Plaintiffs argued, *inter alia,* that the City's regulations and other actions rise to the level of a "taking" of their property and that the City has engaged in inequitable precondemnation activities for which they are entitled to compensation. The City

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[1] The named plaintiffs are Kaiser Development Co. and Kaiser Hawaii Kai Development Co. Kaiser Development Co., previously known as Kacor Development Co., is a California corporation, licensed to do business in Hawaii. Kaiser Hawaii Kai Development Co. is a Nevada corporation, licensed to do business in Hawaii. Plaintiffs refer to themselves collectively as "Kaiser."

This court notes that it was plaintiff Kaiser Hawaii Kai Development Co. that entered into a development agreement with Bishop in 1961 to develop Hawaii Kai. Plaintiffs allege that plaintiff Kaiser Hawaii Kai Development Co. holds the right to develop Queen's Beach for the benefit of Kaiser Development Co., and that Kaiser Development Co. has the right to develop Queen's Beach pursuant to the development agreement. There is nothing in the record indicating the relationship between these two named parties. The court notes only that any rights Kaiser Development Co. may have derive from those of Kaiser Hawaii Kai Development Co. pursuant to its development agreement with Bishop. Kaiser Development Co. does not assert rights independent of Kaiser Hawaii Kai Development Co.

[2] Plaintiffs/intervenors Lyman, Jr., Takabuki, Thompson, Richardson, and Peters, Jr. are trustees of the Kamehameha Schools/Bishop Estate. The Bishop Estate was established in 1884 by the will of Princess Bernice Pauahi Bishop as a perpetual trust for the education of Native Hawaiians. The corpus of the trust is land originally owned by the Princess. Trust lands, of which Hawaii Kai is a part, comprise about eight percent of the land area in the state and 15.1% of the lands on Oahu. The estate owns 19.6% of Oahu's residential land and 24.43% of Oahu's unimproved residential land. *Hawaii Housing Authority v. Lyman,* 68 Hawaii 54, 66 n. 7, 704 P.2d 888 (1985).

brought motions for summary judgment against both plaintiffs on all claims. As discussed herein, defendant's motions are GRANTED IN PART and DENIED IN PART, the net result being to dismiss Kaiser from this lawsuit, and to allow Bishop to pursue only its claims for inequitable precondemnation activities.

I

BACKGROUND

A. *Facts*

The Bernice Pauahi Bishop Estate (Bishop) owns approximately 6000 acres situated at Maunalua, in the City and County of Honolulu, on the Island of Oahu. In 1961, Bishop entered into a development agreement with Kaiser Hawaii Kai Development Co. (Kaiser)[3] to develop this land into a new urban community. Much of this new community, Hawaii Kai, is now completed.

The subject of this dispute, however, is a large hotel/resort complex that Kaiser had hoped to build at Queen's Beach, a 210-acre parcel of land at the northeasterly end of Hawaii Kai. Kaiser alleges that it considered this resort its "crown jewel" and economic reward from the vast community development project. According to various affidavits, Kaiser spent over $8 million in building the Hawaii Kai infrastructure "oversized" to accommodate the anticipated development at Queen's Beach. However, Kaiser made no attempt to develop Queen's Beach until 1971.

The 1959 Honolulu City Charter required the adoption of a general plan for the long-range development of the

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[3] *See supra* note 1.

city. Under both the first General Plan of 1960 and a second General Plan of 1964, Queen's Beach was designated as a resort and commercial area. Similarly, in both the 1964 and 1966 Detailed Land Use Maps (DLUMs), which were adopted for numerous areas of Honolulu to accompany the General Plan, Queen's Beach was designated as a resort and commercial area. In 1973, the Revised Charter for the City and County of Honolulu supplanted the previous Charter, and a new General Plan became effective in 1977, which also listed Queen's Beach as a potential resort site. In 1982, however, the City adopted a revised General Plan, which modified the population densities and eliminated Queen's Beach as a future resort site. As required by the 1973 Charter, in 1977, the City began to formulate development plans for all areas of the city, including East Honolulu, the area of Hawaii Kai. In 1983, the City enacted a new Development Plan for East Honolulu, which changed the previous resort designation on the 1966 DLUM to preservation and park uses.

This litany of plans is made somewhat more confusing by the fact that the *zoning* codes were not updated when new general plans were adopted. From 1960 to 1969, the zoning for Queen's Beach was residential. In 1969, the Comprehensive Zoning Code also zoned Queen's Beach for single family residential homes. This zoning remained in effect until 1984, when it was changed to P-1, or preservation/park.[4]

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[4] Article 3 to the Comprehensive Zoning Code of 1978, as revised, provides for the P-1 Preservation District as follows:

Sec. 21-3.1. *Legislative Intent.*

The purpose of creating this district is to establish areas to protect and preserve park lands, wilderness areas, open spaces, beach reserves, scenic areas and historic sites, open ranges, watersheds and water supplies; to conserve fish and wildlife; and to promote forestry and grazing. It is intended that all lands within a preservation

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Kaiser first actively sought to develop Queen's Beach in 1971 when it applied to rezone the property from

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(ftn. continued)
district which are under state conservation district jurisdiction shall be governed by the requirements and procedures of Chapter 205, HRS, as amended. (Am.Ord. 3234, 84-42)

Sec. 21-3.2. *Use Regulations.*

Within a P-1 Preservation district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:
(1) Fish hatcheries and fish ponds;
(2) Forests and forestry;
(3) Game preserves;
(4) Private, non-illuminated golf courses, including par-3 but not miniature, with a minimum area of 10 acres;
(5) Open agricultural uses not requiring intensive cultivation, including orchards, vineyards, nurseries, and the raising and grazing of livestock other than swine;
(6) Parks, recreational areas, botanical and zoological gardens, golf courses, marinas and other public buildings and uses;
(7) Public utilities installations and substations; provided that offices or storage or maintenance facilities therefor shall be permitted only as conditional uses;
(8) Watersheds, wells, water reservoirs and water control structures.
(b) Accessory uses and structures;
Uses and structures which are customarily accessory and clearly incidental and subordinate to principal uses and structures; provided that roadside stands for sale of agricultural products shall not be permitted as accessory to agricultural uses in this district; provided further, that in connection with golf courses, accessory uses shall be designed and scaled to meet only the requirements of the members, guests or users of the golf course. Private utilities, including temporary sewage treatment plants, shall also be permitted as accessory uses, provided such use is approved by the Director of Land Utilization. Private utilities so approved shall be permitted notwithstanding the location on a noncontiguous zoning lot or in another zoning district of the principal use or uses served thereby, and paragraph (1) of the definition of "accessory use"

(continued)

residential to resort in accordance with the 1964 and 1966 DLUMs. Kaiser later withdrew the request, it alleges, because of confusion engendered by the City's activities to acquire the area as a park. Kaiser did not again seek a zoning change until May 1983. This request was turned down and the denial was upheld by the zoning board of appeals.

Kaiser and Bishop allege, with some support, that the City has been on a mission to acquire the land since 1970. They contend that the City tried to impose unreasonable exactions as a prerequisite for hotel development at Queen's Beach, such as dedication of the oceanfront as a public park; that the City downzoned

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(ftn. continued)

in Section 21-1.10 shall be inapplicable thereto.

(c) Conditional uses and structures.

Uses and structures hereinafter specified, subject to compliance with the provisions of part D of Article 2 hereof:

(1) Cemetery, columbarium, crematory, and mausoleum;

(2) Extractive industries, including the removal of sand, rock, soil and gravel;

(3) Private marinas, including facilities for storage and repair of boats and sale of boating supplies and fuel;

(4) Private refuse dumps, sanitary fills and incinerators;

(5) Recreation and amusement facilities of an outdoor nature, other than as specified under permitted principal uses and structures;

(6) Storage or maintenance installation for public utilities;

(7) Television or other broadcasting stations and line-of-sight relay devices;

(8) Private recreational camps;

(9) Private riding academies;

(10) Facilities for movie and television program production.

(d) Special permit uses and structures.

Uses and structures hereinafter specified, subject to compliance with the provisions of part E of Article 2 hereof:

(1) Private vacation cabins;

(2) Temporary structures and uses incidental to land development or building construction. (Am.Ord. 3234, 3906, 4412)

Queen's Beach and downgraded the density in the area to depress the acquisition price of the land; and that the City's policy has been to freeze development at Queen's Beach until it could be acquired as a park.

B. *Complaint*

Kaiser's and Bishop Estate's complaints are nearly identical and allege violations of their civil and constitutional rights under 42 U.S.C. § 1983, the Fourteenth Amendment, the Fifth Amendment, and the Contracts Clause. Kaiser alleges that it has property rights in Queen's Beach pursuant to its development agreement with the Bishop Estate. Bishop alleges that it dedicated lands to long term uses in anticipation of realizing rental income from the development of the property under the agreement with Kaiser.

Plaintiffs allege a violation of their due process rights under two takings theories. First, they allege, under principles of inverse condemnation, that the City's wrongful imposition of confiscatory land use regulations deprived them of all economically viable use of their property without just compensation.[5] Second, plaintiffs

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[5] The Supreme Court has noted two theories which could potentially support a claim of "taking" by overregulation. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3116-17, 3122-23, 87 L.Ed.2d 126 (1985). First, a plaintiff may assert that a zoning or other regulation may be so restrictive as to deny him all reasonable beneficial use of his property and thus has the same effect as a taking of the property for public use. Under this theory, such a taking would arguably require payment of just compensation under the fifth amendment.

Alternatively, such a regulation could be viewed as violating the fourteenth amendment. This theory posits [*sic*] that

> regulation that goes so far that it has the same effect as a

(continued)

allege a taking under a "precondemnation blight" theory. They argue that the City's intent all along has been to acquire Queen's Beach as a park, that the City restricted

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(ftn. continued)

> taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the Government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy for a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.

105 S.Ct. at 3122.

Although the Supreme Court has often referred to regulation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), it has never determined whether compensation is constitutionally required in inverse condemnation actions. In fact, the Court has left this issue unanswered four times since 1980. *MacDonald, Sommer & Frates v. Yolo County*, ___ U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). The Supreme Court will probably face this issue yet again next term. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, ___ U.S. ___, 106 S.Ct. 3292, 92 L.Ed.2d 708 (1986) (probably jurisdiction noted).

Given my disposition of these motions, I need not offer my opinion on the issue today. *But see Lai v. City and County of Honolulu*, Civil No. 78-0355 (D.Hawaii Mar. 21, 1986) [Available on WESTLAW, DCTU database] (findings of facts and conclustions [*sic*] of law awarding damages under the Fifth and Fourteenth amendments on theory of inverse condemnation). *See also Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (indicating probable appropriateness of award of damages for inverse condemnation).

development of the property, attempted to force dedication of a substantial portion of the property, and has otherwise engaged in such inequitable precondemnation activities as to result in "planning blight" for which they are entitled to compensation. *See, e.g., Martino v. Santa Clara Valley Water District,* 703 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied,* 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983); *Washington Water & Light Co., v. East Yolo Community Services District,* 120 Cal.App.3d 389, 174 Cal.Rptr. 612, 616-17 (1981); *Taper v. City of Long Beach,* 129 Cal.App.3d 590, 181 Cal.Rptr. 169, 176-77 (1982).

Their additional substantive due process claims are that the regulations have deprived them of their "vested property rights" to develop Queen's Beach in accordance with the 1966 DLUM, and that the zoning regulations themselves violate due process.

Their complaint also alleges a violation of their procedural due process rights, that is, a notice and opportunity to be heard on the decision to downzone Queen's Beach.

Finally, Bishop and Kaiser claim that the City's actions have violated their constitutional rights under the Contract Clause.[6]

Kaiser and Bishop pray for just compensation for their various takings claims, consequential damages, and declaratory relief.

C. *Defendant's Motion for Summary Judgment*

The City makes the following arguments in support of its motions for summary judgment:

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[6] Kaiser and Bishop may also be asserting a violation of the Equal Protection Clause. *See infra* note 25.

— Kaiser does not have a protected property interest in Queen's Beach;
— Kaiser lacks standing;
— Kaiser's and Bishop's claims are not ripe for review;
— Kaiser and Bishop have not been denied substantive due process;
— Kaiser and Bishop have not been denied procedural due process;
— The City's regulations do not violate the fifth amendment because Bishop has already earned a significant return from its Hawaii Kai development; and
— Kaiser and Bishop have not suffered an impairment of contract.

The City recognizes that there are genuine issues of material fact in dispute, particularly as to whether the City engaged in inequitable precondemnation activities and whether there exists any economically viable use to Queen's Beach under the present zoning. The City stresses that it is not seeking summary judgment on these issues, *per se,* but rather that there are other reasons, not involving disputed facts, that entitle it to summary judgment on all counts.

D. *Applicable Legal Standard*

The standard this court must apply in reviewing the instant motions is well established. Under Fed.R.Civ.P. 56, a motion for summary judgment may only be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The City has the heavy burden of showing the absence of any material facts; the underlying facts must be viewed in the light most favorable to Kaiser and Bishop, and all inferences must be drawn in their favor.

E.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970).

Plaintiffs appear to assert that actions involving land use designations are *per se* unsuitable for resolution by summary judgment. The Ninth Circuit has recently admonished that summary dismissals must be viewed with "particular skepticism" in cases involving inverse condemnation, because a court must often resort to "essentially ad hoc factual inquiries" to determine whether compensation is due. *Hall v. City of Santa Barbara,* 797 F.2d 1493, 1497 (9th Cir. 1986). Nevertheless, such a disposition "is not always inappropriate." *Id.* at 1497. There is no special summary judgment standard for inverse condemnation cases. If the City can show the absence of any genuine and material disputes of fact such that plaintiffs, as a matter of law, are not entitled to prevail, this court must grant its motions for summary judgment.

II

DOES KAISER HAVE A PROTECTABLE PROPERTY INTEREST

The City argues that Kaiser does not have a property interest that is protected by the Fifth Amendment. Kaiser merely has a contract, which although it concerns land, does not give any constitutionally-protected property rights. The City, if it has harmed Kaiser at all, has merely frustrated Kaiser's contract, but it has not "taken" any property.

In determining whether Kaiser has a property interest that is entitled to protection under the federal constitution, federal courts are not bound by state law. However, federal courts look to state law for aid in determining the scope of property interests. *United*

States v. 3,035.73 Acres of Land, 650 F.2d 938, 939-40 (8th Cir. 1981); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). In this case, the development agreement itself, decisions by the Hawaii Supreme Court, and federal law all support the City's argument that Kaiser has no protectable property interest.

A. *Development Agreement*

[1] The contours defining "property" are not always clear. The term is used to describe not only a tangible physical thing, but also "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945). Kaiser argues that there is a trend to allow compensation for any valuable interest, in accordance with fairness and justice, and that the development agreement has given it a "bundle of rights" sufficient to afford it a legally enforceable property interest. These rights, it asserts, include the exclusive right to develop the property, possession of the property, and the right to dispose of the property. Kaiser also asserts that its interest in Queen's Beach has "vested" since it has "selected" Queen's Beach and since it has expended millions of dollars in infrastructure improvement in preparation for development.

A close look at the development agreement shows that Kaiser and Bishop have set up a means by which Bishop can make money from the development of Hawaii Kai without incurring any indebtedness itself. Under the agreement, Bishop owns the land. Kaiser has the "exclusive right," i.e. the first right, to subdivide, develop, and improve the land at its own expense and risk. The agreement specifies that Kaiser has the prior-

ity right to lease land to build the first hotel at Hawaii Kai.

Bishop allows Kaiser to access the land, insofar as is necessary for preliminary development and inspection. Kaiser has the right to "select" tracts of land for development. After it has selected tracts, Kaiser prepares subdivision maps and plans, to be approved by Bishop and governmental agencies. After the necessray approvals, Kaiser shall develop the tract in keeping with the plan and shall obtain any necessary approvals.

On the completion of a development, Kaiser is to find lessees for the lots in the tracts. Bishop remains the land owner and the lessor. Bishop executes the leases.

Kaiser recovers its investment, plus a profit for its effort and risk, from lot development payments and rental proceeds, and Bishop receives rentals for the land which Kaiser improves.[7]

Kaiser's assertions misconstrue the development agreement. For example, Kaiser does not "possess" the land. Bishop owns the land and remains the landowner

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[7] The Development Agreement also provides, *inter alia*, that:

> Bishop is not to lease, transfer, etc. any land without Kaiser's consent. However, if Kaiser does not commence lot development within six months after selecting a tract, Bishop may lease the lot or lots to someone else.
>
> Kaiser may assign or sublet its leased lots or the right to lease the property, with the approval of Bishop.
>
> At the expiration of the agreement, Kaiser shall complete development in selected tracts, but any and all rights in non-selected land cease. Bishop shall try to make arrangements with future lessees to recoup Kaiser's improvement costs.
>
> If any of the land is condemned, Kaiser is entitled to an apportionment for the value of any buildings or other structures on the land and for costs incurred on land that had not yet been leased.

and lessor of Kaiser's completed developments; Kaiser has a right of access for development purposes. Nor does Kaiser have the right to "dispose" of the property. At most, it may assign or sublet lots it has leased from Bishop, with Bishop's consent or approval. Nor does Kaiser have any "vested rights" in the Queen's Beach property. Both the development agreement and a subsequent arbitration decision make clear that Kaiser has the right, but not the obligation, to develop property in Hawaii Kai as its own expense and risk.

In addition, Kaiser has not invested any money specifically in Queen's Beach. Even assuming that costs Kaiser has invested in infrastructure elsewhere in Hawaii Kai can be properly allocated to the anticipated development, this investment represents a business risk undertaken by Kaiser. Kaiser cannot turn a contract right into a property right simply by investing in the subject matter of the contract. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1275-76 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984); *see also infra* II.C.

Finally, the very terms of the agreement explicitly state that Kaiser is to have no interest in the lands other than that of a lessee in the lands it leases. Article R of the Development Agreement, describing the relationship between the parties, states:

This Agreement shall not be construed as creating the relationship of principal and agent between BISHOP and [KAISER], nor as creating a partnership, join [*sic*] venture, or association of any kind between BISHOP and [KAISER], it being the purpose and intent hereof to create only a contract relationship betwen BISHOP as landowner and [KAISER] as an independent contractor to subdivide, develop and improve The Land. It is contemplated that BISHOP as landowner will issue leases as lessor to the public, and to the extent that

[KAISER] takes leases under and pursuant hereto, there shall be the relationship of lessor on the part of BISHOP and of lessee on the part of [KAISER], but not otherwise.

Similarly, Section F-15 stresses that Bishop is to have all the rights of a lessor under leases made under the agreement, that Bishop remains the owner of leased lots, and that Kaiser "shall have no interest" in leased lots other than those it may acquire as a lessee of particular lots. And in this regard, it should be noted that Kaiser has not even leased Queen's Beach.

In summary, the development agreement affords Kaiser the business opportunity to develop land at Hawaii Kai, including the priority right to lease land to build the first hotel. However, the agreement does not give Kaiser any protectable interest in the property it develops.

B. *State Interpretations of the Development Agreement*

The Supreme Court of Hawaii has had three separate occasions to analyze the respective interests of Kaiser and Bishop under their development agreement. The court has thrice determined that the agreement gives Kaiser no property interests.

In *In re Tax Appeal of Kaiser Hawaii-Kai Development Co.*, 52 Hawaii 623, 484 P.2d 138 (1971), the court considered the nature of leased lot payments for tax purposes. The lower court had determined that Bishop and Kaiser had a joint ownership interest in lease rentals received by Bishop. The supreme court however analyzed the development agreement and determined that Kaiser was an independent contractor, not a co-lessor, and had no interest in the lands. Bishop alone, as the exclusive owner and lessor, was entitled to rental pay-

ments, but under the agreement, Kaiser derived some money from the lot payments as Bishop's *quid pro quo* for Kaiser's contractual services. The court noted that these facts, as spelled out in the development agreement, "are not changed by Bishop and Hawaii Kai agreeing to deem them to be otherwise." 52 Hawaii at 627, 484 P.2d 138. Thus the court held that Kaiser was required to pay general excise tax on the rental proceeds as gross receipts derived by it from its contracting business.

In another case involving real property taxes, the court again examined the agreement and found that Bishop remains the lessor of developed lots, retains "rights in respect of matters which have to be approved by it, or as to which mutual agreement has to be reached, and does not relinquish control over the land." *Kaiser Hawaii Kai Development Co. v. Murray,* 49 Hawaii 214, 226, 412 P.2d 925 (1966).

Finally, Kaiser argues that the Hawaii legislature has recognized that a developer, pursuant to a development agreement, has a compensable interest. The Hawaii Land Reform Act, Hawaii Rev.Stat. § 516-26, provides that if the Hawaii Housing Authority condemns land, the fee owner, lessor, and all legal and equitable owners share in the compensation. A developer may also share in the compensation to the extent of his interest as may be determined by agreement. Kaiser asserts that this recognizes its property interest in the land. The Hawaii Supreme Court, however, in a case involving Hawaii Kai, Bishop, and Kaiser, has recently precluded this argument. In *Hawaii Housing Authority v. Lyman,* 68 Hawaii 54, 704 P.2d 888 (1985), the court stressed that Kaiser has no equitable interests in any parcels of lands, and that its rights are defined by the development agreement. Kaiser's rights to any proceeds of the award "necessarily derive from those of [Bishop Estate], since

such rights, if they do exist, stem from the development agreement contract." 68 Hawaii at 77, 704 P.2d 888.

In short, the Hawaii Supreme Court has consistently refused to recognize Kaiser's asserted property interest, and the state court's interpretation is entitled to considerable deference in this matter.

C. *Distinction Between Contract and Property Rights for an Inverse Condemnation Analysis*

The constitutional takings analysis has long distinguished between mere contract rights, which are not compensable, and a property interest, which is subject to Fifth and Fourteenth Amendment protection. This distinction has been well developed in *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923), and its progeny.

In *Omnia,* the plaintiff owned a contract which gave it the right to purchase steel plate from a steel company at a price below market. The government requisitioned the steel company's entire production of steel plate for the year and ordered the company not to comply with the contract. The plaintiff alleged a taking. The Court, however, held that there had been no taking. In order for there to be a taking of the contract itself, the government must acquire the obligation or the right to enforce it. The government had taken the *subject matter* of the contract, and the plaintiff had merely suffered a *consequential* loss resulting from lawful government action. The Court noted that the performance of the contract was rendered impossible and that it had not been appropriated, but ended. 261 U.S. at 510-11, 43 S.Ct. at 438.

T.O.F.C., Inc. v. United States, 683 F.2d 389, 231 Ct.Cl. 182 (1982), similarly makes the distinction

between property and contract rights. In this case, Erie Railroad and T.O.F.C. built facilities for a piggyback loading terminal. Erie took title to the land, and T.O.F.C. was given an exclusive right to operate the facilities. Erie also agreed to pay T.O.F.C. to reimburse it for its investment in the terminals. Erie went bankrupt, and Conrail took over the property but refused to continue the contract with T.O.F.C. T.O.F.C. argued that it had a property interest that had been taken, but the court held, under *Omnia,* that there had been no taking. Erie had owned the land and facilities — T.O.F.C. had essentially had only a service contract for an exclusive right to operate the facility. The court held that the Fifth Amendment compensated only for direct appropriation of property, not for consequential injuries resulting from the lawful exercise of government power. 683 F.2d at 395.

In *PVM Redwood Co. v. United States,* 686 F.2d 1327 (9th Cir. 1982), *cert. denied,* 459 U.S. 1106, 103 S.Ct. 731, 74 L.Ed.2d 955 (1983), the Ninth Circuit held that PVM had failed to distinguish between "appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power." 686 F.2d at 1329, *quoting United States v. Grand River Dam Authority,* 363 U.S. 229, 236, 80 S.Ct. 1134, 1138, 4 L.Ed.2d 1186 (1960). PVM operated a sawmill and had alleged that after the passage of the Redwood Park Expansion Act, their redwood suppliers could no longer furnish their needs, causing them an increase in production costs. The court held that what had been frustrated was an expectancy based on past experience that contracts would be entered into.

[2] The City cites numerous other cases making this property/contract distinction and stresses that the natrue of Kaiser's contract relationship to the property controls the issue. As this court has determined above, Kaiser

holds merely the contractual right to construct improvements on the land at Hawaii Kai, including Queen's Beach, and has no separate interest in the property itself. The City's actions may have frustrated the contract between Bishop and Kaiser, but the City has not "taken" any protectable property from Kaiser.[8]

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[8] Kaiser cites cases which stand for the proposition that valid contracts are property, and that the taking of a contract requires just compensation. This proposition cannot be disputed. However, in the cited cases, the government had either appropriated the contract itself or had otherwise altered the contract itself. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (federal government repealed legislation providing for plaintiff's insurance policy); *Larionoff v. United States*, 533 F.2d 1167, 1179-80 (D.C.Cir. 1976), *aff'd*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) (federal government repealed legislation providing for reenlistment bonus); *Hall v. Wisconsin*, 103 U.S. (13 Otto) 5, 26 L.Ed. 302 (1880) (state repealed legislation under which plaintiff had contract for services). Thus, these cases are inapplicable to our situation, which involves a taking of the subject matter of the contract.

Kaiser also argues, citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), that its development rights are an integral part of the property taken, and thus are compensable. *Monongahela* involved the value to be paid for condemnation of a series of navigation dams and locks. The Court held that the value should include both the tangible property and an amount for the franchise owned by the company to collect tolls, because the franchise was "not merely a contract in respect of the property taken, but was an integral part of it. . . ." *Omnia*, 261 U.S. at 513, 43 S.Ct. at 439 (distinguishing *Monongahela*). This case is inapposite, however, as recognized by the Court in *Omnia*, since the government had taken the tangible property of the plaintiff.

D. *Does Kaiser Have an Options Contract that Represents a Compensable Property Interest?*

Kaiser asserts, in the alternative, that it has an option to lease Queen's Beach for the purpose of constructing the first hotel,[9] and that this option is a compensable property interest in a condemnation proceeding.

While the general rule is that an option is merely a contract and noncompensable in condemnation,[10] Kaiser argues that there is a significant "trend" toward recognizing an option as a property interest. In the leading case on this issue, *County of San Diego v. Miller*, 13 Cal.3d 684, 532 P.2d 139, 119 Cal.Rptr. 491 (1975), the California Supreme Court reasoned:

> Important changes have occurred in eminent domain law weakening the legal foundation of the Court of Appeal cases denying recovery to the optionee and eroding their authority. [These cases] turned on application of the so-called "property interest-contractual right" test which in turn depended on common law concepts of property. . . .
>
> We do not dispute the technical correctness of the . . . conclusion that — applying traditional common law concepts of property — the option creates in the optionee no estate as such in the land. However, this test is no longer conclusive.
>
> Recent decisions, both of this and of the federal courts, have held the property-contract labelling process is not necessarily determinative in questions

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[9] In the event Kaiser takes such a lease, the development agreement specifies an applicable rental formula of a percentage of gross income from the hotel.

[10] *See, e.g.*, 27 Am.Jur.2d *Eminent Domain* § 255 (1966 and Supp. 1985); annot., 85 A.L.R.2d 588 (1962).

> of due process compensation. Instead, compensation issues should be decided on considerations of fairness and public policy. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law." "[T]he right to compensation is to be determined by whether the condemnation has deprived claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."

532 P.2d at 142-143, 119 Cal.Rptr. at 494-95 (citations and emphasis omitted).

The court then examined the expectations of the parties and determined that the optionor had no reasonable expectations of receiving a greater purchase price than the option, and that the optionee expected the benefit of his bargain — that is, to receive any value in excess of the purchase price. The share to the optionee then, should be the excess, if any, of the condemnation award over the purchase price. The court also noted the public policy interests favoring option arrangements.

Hawaii has never directly addressed this issue; however, federal courts in this state have indicated skepticism that Hawaii would recognize an option as a protectable interest.[11] Moreover, the cases cited by Kaiser in support of its position only recognize that *certain* options are compensable.[12] No jurisdiction has

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[11] In *Windward Partners v. Ariyoshi*, 693 F.2d 928, 929 (1982), *cert. denied*, 461 U.S. 906, 103 S.Ct. 1877, 76 L.Ed.2d 809 (1983), the Ninth Circuit noted in passing: "In any event, Hawaii courts have never recognized an option as a compensable property interest." Similarly, in *In re Continental Properties, Inc.*, 15 B.R. 732 (Bankr.D.Hawaii 1981), the court held that an option conveys no equitable interest in land.

[12] Most of the cited cases concern either options to renew held by a lessee in possession, *e.g.*, *Sholom, Inc. v. State Roads Commission*,

(continued)

addressed the question whether a bare unexercised option to lease property, which Kaiser asserts that it has, is a compensable property interest.

[3] The most fundamental problem in Kaiser's argument, however, is whether Kaiser has an option at all. This court tends to agree with the City that Kaiser has no option, but merely a right of first refusal.

An option to purchase is a contract whereby the owner of the property, for valuable consideration, sells the optionee the right to buy a specified property, for a specified price, within a specified time, and on the terms in the option. The option holder thus may perform or not perform the conditions at his option, has the power to force conveyance of the land, ahs immunity from revocation or repudiation by the optioner, and may enforce these rights in court. If options contracts do not actually provide the holder with an interest in the land, they do provide considerable value on which the holder can rely. *E.g., Spokane School District v. Parzybok*, 96 Wash.2d 95, 633 P.2d 1324, 1328 (1981).

The *Spokane* court was careful to stress that "[n]ot every option to purchase is necessarily of sufficient value and substance to entitle the holder to participate in a condemnation award." 633 P.2d at 1329. The court noted that here, the option was contained in a lease

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246 Md. 688, 229 A.2d 576 (1967); *State ex rel. Morrison v. Carlson*, 83 Ariz. 363, 321 P.2d 1025 (1958); *Department of Public Works and Buildings v. Bohne*, 415 Ill. 253, 113 N.E.2d 319 (1953), or options to purchase, *e.g., Nicholson v. Weaver*, 194 F.2d 804 (9th Cir. 1952), *Spokane School District v. Parzybok*, 96 Wash.2d 95, 633 P.2d 1324 (1981); *Texaco, Inc. v. Commissioner of Transportation*, 34 Conn.Supp. 194, 383 A.2d 1060 (Conn.Super.Ct. 1977); *Sholom, Inc. v. State Roads Commission*, 246 Md. 688, 229 A.2d 576 (1967); *County of San Diego v. Miller*, 13 Cal.3d 684, 532 P.2d 139, 119 Cal.Rptr. 491 (1975).

covenant, there was every reason to suppose the option would be exercised, the property had increased in value, and the optionee had suffered a definitely measurable loss.

Further, the *Spokane* court and others have recognized that a preemptive right of first refusal creates no interest in property and gives far less than does an options contract. Whereas the option contract gives the power to compel sale, the right of first refusal merely requires the owner to offer it to the holder first, if he decides to sell at all. Thus, one who holds a right of first refusal would not necessarily be entitled to share in a condemnation award. 633 P.2d at 1329, *citing Robroy Land Co. v. Prather,* 95 Wash.2d 66, 622 P.2d 367 (1980). *See also City of Ashland v. Kittle,* 347 S.W.2d 522 (Ky. 1961) (mere right of first refusal not a compensable interest).

Turning to the development agreement, Kaiser's interest is more like a right of first refusal than an option to lease. The provision states that Kaiser "shall have the priority right to lease one or more lots for the purpose of constructing the first hotel on the land." The agreement does not give Kaiser the right to compel Bishop to lease a particular piece of property; it is not clear that there was valuable consideration given; and the City points out that Kaiser did not even have a concrete expectation of a leasehold for developing a hotel at Queen's Beach, since the area had never been zoned for resort development.

E. *Conclusion*

In conclusion, this issue is proper for summary judgment, since there are no triable issues of fact involved in the interpretation of the development agree-

ment between Kaiser and Bishop. I agree with the courts of this state that the development agreement does not give Kaiser a constitutionally-protected interest in Queen's Beach. I also find that Kaiser does not have an option contract with Bishop, but that even if Kaiser had an option, there is no indication that the Hawaii courts would find it a compensable interest. In short, Kaiser merely has a contract to develop land as a business risk, which has been frustrated, but not taken, by the City's zoning actions.[13]

II

DEPRIVATION OF "VESTED" PROPERTY RIGHTS

Kaiser and Bishop allege that they have been denied due process in that they have been deprived their "vested property rights to develop Queen's Beach pursuant to the 1966 DLUM agreement and the City land use regulations prior to 1982." As Bishop states the allegation: "The City first breached and then attempted by passage of restrictive land use regulations to impair its agreement to allow development at Queen's Beach in accordance with the 1966 DLUM."

[4] This claim is without merit; plaintiffs have no property rights pursuant to the DLUM or other zoning regulations. First, the DLUM was not a zoning

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[13] Because I find that Kaiser has no property interest at Queen's Beach, I need not address the City's argument that Kaiser lacks standing because it has not been injured by the City's actions. However, even if Kaiser did have a property interest at Queen's Beach, summary judgment would have to be granted against Kaiser on all issues for which it is granted against Bishop. Kaiser's and Bishop's complaints are nearly identical. Except for the fundamental distinction between their property rights, every conclusion in this opinion applies equally to Kaiser as to Bishop.

ordinance and did not have the effect of a zoning ordinance. The DLUM was merely a detailed map to implement the general plan. *Nuuanu Neighborhood Association v. Department of Land Utilization,* 63 Hawaii 444, 630 P.2d 107 (1981); Honolulu City and County Ordinance No. 4517 (June 18, 1975).

[5] Furthermore, zoning ordinances do not amount to contracts with developers. Courts have held, in light of the broad principle that municipalities cannot barter away their legislative or police power, *United States Trust Co. v. New Jersey,* 431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977); *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.,* 564 F.Supp. 1425, 1428 (W.D.Va. 1983), *aff'd,* 740 F.2d 961 (4th Cir. 1984), that municipalities cannot bind themselves with regard to future zoning or other legislative decisions. *E.g., Beckman v. Teaneck Township,* 6 N.J. 530, 79 A.2d 301 (1951); *Louisville v. Fiscal Court of Jefferson County,* 623 S.W.2d 219, 224 (Ky. 1981); *Barton v. Atkinson,* 228 Ga. 733, 187 S.E.2d 835, 843 (1972).

Developers may sometimes succeed, however, on a theory of zoning estoppel. *County of Kauai v. Pacific Standard Life Insurance Co.,* 65 Hawaii 318, 653 P.2d 766 (1982), delineates the standards which a developer must meet in order to claim a vested right to a particular land use under an estoppel theory:

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

65 Hawaii at 327, 653 P.2d 766, quoting *Life of the Land v. City Council,* 61 Hawaii 390, 453, 606 P.2d 866 (1980).

The *County of Kauai* court held that the "final discretionary action" on the specific project constitutes the "official assurance" for zoning estoppel purposes. 65 Hawaii at 328, 653 P.2d 766. In that case, the developers had secured resort zoning; however, after the zoning code had been amended, a citizens' group succeeded in getting the issue on a referendum ballot. Meanwhile, the developer obtained a special management area permit and building permits, and had spent considerable money. The court held that the last discretionary act was the special management area permit, but that the certification of the referendum nullified the effect of that permit and the building permits, and thus that the developer had had no right to rely on those permits.

In our case, Bishop and Kaiser never even had the proper zoning in place for their resort development. Thus, Bishop and Kaiser's claim that they had a vested right to assurances that they could develop at Queen's Beach must fail.[14]

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[14] Bishop appears to misunderstand the limited scope of the City's assertion on this issue. In its memorandum in opposition to summary judgment, Bishop spends considerable time arguing that it need not establish "vested rights" as a precondition to recovery under either their overregulation or inequitable precondemnation activities theories. The City merely argues, and I so hold, that Bishop and Kaiser have no "contract" with the City under the DLUM such that they have a right to develop at Queen's Beach. This does not dispose of their more general takings claims, however. That is, they do not necessarily have to show that they have received the last discretionary assurance in order to make out a potential constitutional takings claim.

IV

RIPENESS

The City argues that plaintiffs' claims are not ripe for review. I agree that plaintiffs have failed to meet either of the finality requirements imposed by the recent Supreme Court cases of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) and *MacDonald, Sommer & Frates v. Yolo County*, ___ U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

In *Williamson County*, the Supreme Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 105 S.Ct. at 3117. The Court reasoned that it is simply impossible to evaluate the economic impact of the regulations and the extent to which they interfered with reasonable investment-backed expectations until the administrative agency has made a final definitive determination on how it will apply the regulations at issue to the particular land in question. *Id.* at 3119.[15]

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[15] Bishop argues that this finality argument does not apply to its claims under § 1983 because they need not exhaust administrative remedies. The Supreme Court rejected this argument in *Williamson County*, however, explaining that exhaustion and finality were conceptually distinct:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse

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In addition, the Court held that a taking claim is not ripe until a plaintiff has sought compensation through state procedures. The Court reasoned that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 3121. The burden is on the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Id.* at 3122.[16]

In June, the Supreme Court reaffirmed the principles of the *Williamson County* case in *MacDonald, Sommer & Frates v. Yolo County*, ___ U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). In this case, a majority of the Court again avoided the issue of whether a monetary remedy is constitutionally required in inverse condemnation cases involving regulatory takings by holding the claim unripe for review. Reaffirming the principles of *Williamson County*, the Court held that it was unable to determine whether a taking had in fact occurred.

(ftn. continued)
decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

105 S.Ct. at 3120.

Thus, claims under § 1983 must also meet the Court's finality requirements.

[16] The Court held these principles equally applicable whether the claim for inverse condemnation was asserted under the Fifth Amendment Just Compensation Clause or under the Fourteenth Amendment Due Process Clause, *see supra* note 5, because, under either theory, it would be impossible to determine if a regulation had gone "too far" until a final decision was made as to how the regulations would apply to the particular property. 105 S.Ct. at 3122-24.

Although the developer's initial proposal had been rejected, he had not received a "final definitive position" from the zoning board, leaving open the possibility that some development would be permitted. 106 S.Ct. at 2568. The Court stressed that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 2569, n. 9.[17]

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[17] The facts in both *Williamson County* and *Yolo County* are instructive for comparison to plaintiffs' position in this case. In *Williamson County*, the plaintiff developer had obtained the planning commission's approval of a preliminary plat for development of a tract based on a 1973 cluster zoning ordinance. Thereupon, the developer spent $3.5 million on a golf course and sewer lines. He then submitted a final plat for approval, several sections of which were given final approval by 1979. The preliminary plat was also reapproved four times during 1973 to 1979. In 1977, the county changed the density limits in the zoning codes; however, the county decided to continue to apply the 1973 zoning regulations to the developer's project and reapproved the preliminary plat in 1978. In 1979, the commission changed its mind and decided to apply the 1977 regulations to the developer's project and asked the developer to submit another plat for approval. The commission denied the approval for numerous reasons. Thereupon, the developer appealed to the zoning board of appeals which determined that the 1973 rules should have been applied. The developer resubmitted the earlier approved preliminary plat, but the commission declined to follow the decision of the appeals board and disapproved the plat for eight different reasons. The developer then filed suit under § 1983 alleging a taking and asserting that the commission should be estopped from denying approval.

The Supreme Court held that the developer's claims were not ripe. The developer had submitted a development plan, which the Court in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), had held was necessary for a challenge to the application of a zoning ordinance. However, the developer had not sought variances that might have allowed it to develop its property according to its proposed plat, notwithstanding the commission's finding that the proposal did not conform to the zoning ordinance. The Court noted that the record showed that variances could have

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A. *Plaintiffs Have Not Met Received a "Final Determination" on Development at Queen's Beach.*

(ftn. continued)
been granted for at least several of the violations, and that absent a finding as to *all eight* of the objections, it would be impossible to tell whether the land retained any beneficial use.

The developer argued that it had done "everything possible" to resolve the dispute with the commission, and that the commission's denial of approval was tantamount to a denial of the variances. But the Court was not moved, stating that there was no evidence that the developer had filed for a written request for variances.

The Court also held the developer's claim unripe because he had not sought compensation, or shown that the procedure was unavailable or inadequate, under Tennessee laws that authorized inverse condemnation actions in certain circumstances.

In *Yolo County*, plaintiff sought to subdivide and develop a cornfield, which was zoned for residential use. The developer in this case had submitted a tentative subdivision map to the county planning commission, which the commission rejected because it did not adequately provide for access, sewers, police protection, and water services.

Plaintiff filed suit, accusing the county of effectively restricting the property to open-space agricultural use, despite its zoning, by denying all permit applications and other requests to implement any other use. Plaintiff specifically alleged that none of the beneficial uses allowed even for agricultural land would be suitable for his property, and that any application for a zone change, variance, or other relief would be futile.

The California Superior Court sustained the County's demurrer, finding that the complaint failed to state a cause of action. The court found that, even if the property was restricted to agricultural uses, this did not preclude all development, and beneficial use could be made of the property, such as ranching and farming. Alternatively, the court held that no monetary damages could be awarded for inverse comdemnation.

The California Court of Appeals affirmed the trial court on both grounds. In discussing the failure of the complaint to state a cause of action, the court explained:

> Here plaintiff applied for approval of a particular and relatively
> (continued)

[6] The City argues that plaintiffs have not met either of the *Williamson County* thresholds. First, they assert that plaintiffs have not met the "final definitive position" prong: They have not submitted a development plan under the present land use regulations, which list at least twenty possible uses for the land; they have not applied for a variance; they have not applied for a zoning change.

(ftn. continued)

> intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

106 S.Ct. at 2565 (quoting California Court of Appeals opinion).

The Court noted that the findings of both lower courts that there was "no total prohibition against the productive use" of the land left open the possibility that some development might be permitted. *Id.* at 2568 & n. 8. Thus, plaintiff had not received a final definitive determination from the zoning board, and the Court was unable to determine whether a taking had occurred.

In addition, the court noted that the lower courts' findings conflicted with plaintiff's allegations that "any beneficial use" is precluded and that future applications would be futile. The Court implied that although futile reapplications for approval were not necessary, a developer had to at least make a meaningful application before a court could determine whether there had been a taking. *Id.* at 2568 n. 8.

Plaintiffs counter that they have already received several final rejections of their efforts at Queen's Beach, that they should not be required to beat their heads against a stone wall, and that all further efforts would be futile.[18]

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[18] Plaintiffs cite *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887 (N.D.Cal. 1982), a pre-*Williamson County* case. In this case, plaintiff sought to develop her land for residential purposes, but delayed the building relying on certain representations by the city. Then the city passed an open space ordinance, and told the plaintiff several times that "no viable private development proposal" would receive city approval and that any application to the city to improve the property would be futile. Plaintiffs alleged that the ordinance permitted no viable economic uses, and that the city had acted intentionally to prohibit all feasible private uses of the land and to maintain it as open space for the public without compensating the fee owner plaintiff. The court held that the claim was ripe because if, as plaintiff had alleged, further applications would be futile, the problems of prematurity and abstractness would be eliminated.

I am not sure, however, that his case would be decided similarly today after *Williamson County* and *Yolo County*, which require a more concrete showing that a final determination has been reached. For example, under the open space ordinance at issue in the case, numerous uses were allowable if a special use permit had been obtained. Under the Court's recent cases, it would seem necessary to see what type of uses remained for the plaintiff's land before a court could evaluate the taking issue.

I admit, though, that these two cases have made the takings inquiry even more complex, since it is difficult to determine when enough is enough, and the property owner can finally come before a court with his claim. Justice White, in his dissent in *Yolo*, bitterly complained that

> [n]othing in our cases . . . suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position

106 S.Ct. at 2571.

Justice White, joined by three other members of the Court, saw

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The record shows that plaintiffs have been involved in an ongoing attempt to develop Queen's Beach as a

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(ftn. continued)
"no reason for importing such a requirement" into the "final decision" analysis; nor would he require landowners to apply for less intensive development. For example, he would find that a "final decision barring all development" had been made

> if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, . . . even though the landowner did not apply for a less intensive development. Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.

Id. at 2572.

Plaintiffs argue that they have received denials of their Queen's Beach project and that they need not make any more fruitless attempts to secure approval. Perhaps Justice White would find that a final decision had indeed been made at Queen's Beach (although it should be noted that plaintiffs' proposed project here is not consistent with the present zoning at Queen's Beach). Nevertheless, Justice White's comments do not represent the present state of the law.

I note that I am not the first judge to have difficulty applying the *Williamson County* doctrine. *See, e.g., HMK Corp. v. County of Chesterfield*, 616 F.Supp. 667, 671 (E.D.Va. 1985). As I have often done in the past, however, I am following the wisdom of Lord Denning who wrote:

> Seek to make your opinions clear at all costs. Make them positive and definite. Not neutral or vacillating. My pupil master told me early on of the client's complaint: "I want your opinion and not your doubts," and of Sir George Jessel's characteristic saying: "I may be wrong and sometimes am, but I am never in doubt."

Lord Denning, *Lord Denning on the Discipline of Law* 7 (1979).

resort.[19] The majority of their activity, however, has been attempts to influence the drafting of the East Honolulu Development Plan and amendments thereto. Plaintiffs have made only two specific applications for zone change or development at Queen's Beach — one in 1971, which they did not follow through on, and one in 1983, which was denied following the adoption of the East Honolulu Development Plan. Plaintiffs have made no attempt to apply for development permits, zoning

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[19] The record shows the following efforts by Kaiser in connection with Queen's Beach:

In 1971, Kaiser applied to change the zoning from residential to resort/commercial, but subsequently withdrew the request. Aff. of Okuda.

In 1981, Kaiser participated in drafting a compromise Development Plan for East Honolulu, which would allow mixed residential and commercial uses at Hawaii Kai. This version was adopted by the city council but vetoed by the mayor. In February and March, 1983, Kaiser again suggested resort designation for Queen's Beach in the the [*sic*] Development Plan, but in April 1983, the city council finally enacted the Development Plan, designating Queen's Beach for park and preservation uses. Aff. of Okuda.

In February 1983, Kaiser applied for a residential subdivision at Queen's Beach, which was in conformity with the then existing R-6 zoning. This application was denied on May 19, 1983 after the passage on May 10, 1983 of the East Honolulu Development Plan which designated the area "preservation." Aff. of Fujimoto; aff. of Whalen.

In 1985, in exploring possible settlement of this action, Kaiser put together a new land use plan for its resort at Queen's Beach. Kaiser submitted it as a proposed amendment to the Development Plan. However, in November 1985, the city managing director indicated that the city would reject the proposed plan, primarily because of the pending lawsuit. In December, the chief planning officer rejected the development plan amendment, and in March 1986, the planning commission voted 5-0 against the amendment. Aff. of Davidson.

changes, or variances at Queen's Beach under its present zoning.

Bishop and Kaiser appear to misunderstand the crucial rationale of the finality requirement. The court simply cannot evaluate a regulatory takings claim until plaintiffs have received "a final and authoritative determination of the *type and intensity of development legally permitted on the subject property.*" *Yolo County,* 106 S.Ct. at 2566 (emphasis added). The present P-1 zoning allows many potentially profitable uses.[20] Plaintiffs have made no meaningful application to determine what uses or combinations of uses might be approved at Queen's Beach. As *Agins v. Tiburon, Williamson County,* and *Yolo County* make clear, there is, as yet, simply no "concrete controversy regarding the application of the specific zoning provisions." *Agins,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Further, plaintiffs have made no attempt to alter their vision of a large hotel complex at Queen's Beach. Rejection of plaintiffs' "exceedingly grandiose development plans" at Queen's Beach does not necessarily mean that the land has no reasonable beneficial uses left or that plaintiffs have been denied all reasonable economic value from their land. *Yolo County,* 106 S.Ct. at 2569 n. 9.[21]

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[20] *See supra* note 4.

[21] Kaiser submitted the affidavit of a Mr. William Wanket, who concluded that the following uses had a "reasonable probability of approval" at Queen's Beach: agriculture, private riding academies, private recreation camps, private golf course, cemetery, private utilities, and aquaculture. His opinions, however, including his determination that private vacation cabins would not be allowed, cannot substitute for an explicit determination from the zoning board or the Department of Land Utilization.

In addition, Kaiser submitted an affidavit from a Mr. William Dornbush, who concluded that none of the P-1 zoning uses are

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Finally, as the Supreme Court has made clear, mere allegations or opinions by the developer that it has "done everything possible" or that requests for a variance or other relief would be futile will not suffice. *Williamson County*, 105 S.Ct. at 3118, 3120-21; *cf. Yolo County*, 106 S.Ct. at 2564, 2568 n. 8.

B. *Plaintiffs Have Not Sought State Compensation.*

The City also asserts that Kaiser has not met the second prong of the *Williamson County* finality doctrine. That is, Kaiser has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate. 105 S.Ct. at 3122.

On this issue, plaintiffs argue, citing *Allen v. City and County of Honolulu*, 58 Hawaii 432, 571 P.2d 328 (1977), that Hawaii does not allow damages for inverse condemnation. However, *Allen* concerned compensation for zoning estoppel and not regulatory takings. While *Allen* indicates that the state court might generally look on damages for development costs with disfavor, it does not necessarily preclude compensation for Bishop's and Kaiser's claims. Accordingly, until the state has denied them compensation, or until plaintiffs otherwise demonstrate that state compensation is unavailable or inade-

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economically viable at Queen's Beach. The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

quate, plaintiffs' claims are not ripe for review by a federal court in a takings action.[22]

C. *The Finality Requirements Do Not Bar Plaintiffs' Claims for Inequitable Precondemnation Activity.*

Plaintiffs argue that even if their overregulation claim is barred as unripe, this court must still consider their claim for inequitable precondemnation activity. I agree.

Williamson County and *Yolo County* stress that it is impossible for a court to determine whether a particular zoning regulation works a taking when applied to a particular piece of property until a final determination has been made of the various uses that can be made of the property. This is because the takings inquiry examines whether thre is any reasonable economic value left to the property at issue. An analysis of beneficial uses is irrelevant, however, to a claim for inequitable precondemnation activities.

In *Martino v. Santa Clara Valley Water District,* 703 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied,* 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983), the Ninth Circuit held that the failure to submit a development plan did not bar a claim that unreasonable delays or

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[22] The Eighth Circuit has recently reached a similar conclusion. In *Littlefield v. City of Afton,* 785 F.2d 596, 609 (8th Cir. 1986), the court held, following *Williamson County,* that plaintiff's takings claim was not ripe because it had not sought compensation from the state. Plaintiff had argued that a state supreme court case barred recovery for inverse comdemnation. However, the Eighth Circuit held that the state court's holding merely limited the use of inverse condemnation damages to cases where injunctive relief would be inadequate. Thus the state court decision did not foreclose such an action. Until the state court had ruled that an inverse condemnation action could not be brought or had denied them compensation, the plaintiff's claim was not ripe for review by a federal court.

other unreasonable conduct in the condemnation process effectively resulted in a taking.[23] Thus, Bishop may proceed with its allegations that the City's conduct concerning Queen's Beach was "so unreasonable as to result in 'planning blight' for which [they] may be entitled to compensation." *Id.*

V

SUBSTANTIVE DUE PROCESS

[7, 8] Bishop and Kaiser appear to argue that the zoning laws on their face violate their rights to substantive due process.[24] The test for substantive due process

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[23] While *Martino* was decided prior to *Williamson County* and *Yolo County*, its rationale still applies. The Ninth Circuit's decision was grounded in *Agins*, which held plaintiff's taking claim premature for failure to submit a development plan. Like the Court's more recent pronouncements, *Agins*, requires a concrete determination of uses so that a court may assess the reasonable value of the property under the regulations.

[24] *Yolo County* and *Williamson County* focused on whether zoning regulations *as applied* to a particular parcel constituted a taking either under the Fifth Amendment or as an abuse of police power that violated the Fourteenth Amendment guaranty of due process. These cases do not preclude a claim that the regulations are arbitrary and capricious and thus that the regulations themselves violate due process.

At first blush, it might appear that Kaiser would have standing to challenge the regulations on their face, under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In that case, the plaintiff, a non-profit developer, contracted to build low-income housing on land owned by a religious order. Under their agreement, the developer became the immediate lessee and in addition had a contract of sale contingent on securing zoning clearances. The Court held that the plaintiff had standing to assert due process rights even though it was not the property owner. By contrast, both the develop-

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in analyzing social and economic regulations, such as the zoning regulations at issue here, is whether the regulations are rationally related to a legitimate state interest. *Williamson v. Lee Optical,* 348 U.S. 483, 487-88, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955). The zoning carries with it a "presumption of rationality that can only be overcome by a clear showing or arbitrariness and irrationality." *Hodel v. Indiana,* 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87, 69 L.Ed.2d 40 (1981). This court is neither a super legislature, nor a zoning board of appeal, and it is not my function to pass on the wisdom or appropriateness of the regulations. *See Construction Industry Association v. City of Petaluma,* 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976).

[9, 10] This court must give considerable deference to the interests pursued by the legislature in passing zoning laws. Zoning ordinances must be upheld unless they are "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). Courts have given legislatures wide latitude in defining what is best for the community. Thus the legislature, under the guise of the "general welfare" may pass ordinances to preserve spiritual, physical, and aesthetic values, *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954), to "enhance the quality of life," *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 129, 98 S.Ct. 2646, 2661, 57 L.Ed.2d 631 (1978), and to create zones

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ment agreement between Kaiser and Bishop, and state court decisions make clear that Kaiser merely has a contractual development interest and no property interest. Kaiser has not even acquired the interests of a lessee at Queen's Beach.

where "the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974).

The City has supplied a substantial analytical report prepared by Michael Fischer, of Sedway, Cook & Associates, a planning firm, that concludes that the general plan, development plans, and the zoning, both in general and as applied at Queen's Beach, "bear a substantial relation to and rationally seek to promote the health, safety, and general welfare" of the people of Honolulu.

Bishop has not submitted any evidence to the contrary, but instead argues that the report is self-serving and that the issue of the legislative goals must be resolved on a more complete factual record, *e.g.,* on the basis of actual testimony or legislative reports and findings as to the need for the legislation.

Although a more complete legislative record would help this court to determine the legislative concerns, the absence of such material does not preclude my finding that the zoning regulations affecting Queen's Beach are rationally tied to a valid goal. *See, e.g., Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) (holding that the complaint does not state a cause of action for denial of due process or equal protection). My inquiry, under the extremely deferential due process review, is at an end if I find that the legislature rationally could have concluded that their goal was in the best interest of the people of Honolulu, and that the legislature could have determined that the regulations were a reasonable means to promote its objective. *Rogin v. Bensalem Township,* 616 F.2d 688-89; *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 242, 104 S.Ct. 2321, 2330, 81 L.Ed.2d 186 (1984) (analyzing the "public use" requirement of the Fifth Amendment under a "rational

basis" analysis); *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 1800, 85 L.Ed.2d 64 (1985).

[11] Given my limited role in reviewing the legislation at issue, I have no problem finding that all of the zoning and land use regulations at issue are rationally related to legitimate planning goals. The DLUMs, General Plans, East Honolulu Development Plan and its amendments were concerned with such legitimate planning concerns as housing, transportation, commercial and economic growth, preservation of open space, and preservation of environmental and historical areas. For example, the stated legislative intent of the P-1 Preservation District is to

> establish areas to protect and preserve park lands, wilderness areas, open spaces, beach reserves, scenic areas and historic sites, open ranges, watersheds and water supplies; to conserve fish and wildlife; and to promote forestry and grazing.

Comprehensive Zoning Code of 1978, as amended, art. 3, sec. 21-3.1.

The plans and zoning scheme that were eventually enacted may not in fact have been the best means of achieving the legislative aims, but the legislature certainly could have concluded that they were a reasonable means to their ends.

This determination of course only addresses Bishop's claim that the regulations themselves deny them substantive due process. This does not dispose of the allegation that they were denied due process because the city misused its zoning power by employing inequitable

precondemnation procedures.[25]

VI

PROCEDURAL DUE PROCESS

In their complaints, plaintiffs assert that they have been denied procedural due process because the City has *de facto* taken their property interests without affording them procedural due process.[26] The City argues that

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[25] Although neither plaintiff states an equal protection claim in their complaints, Kaiser argued in their briefs and at the hearing that the City violated their rights to equal protection. They claim that the City's rules were "applied differently" to Queen's Beach in the designation and zoning of the parcel, in the denial of their zoning application, and by the imposition of unreasonable exactions. They argue that this treatment was "discriminatory" and compensable under both due process and equal protection principles. I assume that Bishop is also making this assertion, although the record is unclear.

Bishop undeniably has the "right to be free of arbitrary or irrational zoning actions." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977). Absent allegations that the regulations involve a suspect classification, a court applies the traditional rational basis standard in reviewing legislation for equal protection violations. To prevail on this claim, Bishop must prove that the zoning regulations and their application "so lack rationality that they constitute a constitutionally impermissible denial of equal protection." *City of New Orleans v. Dukes*, 427 U.S. 297, 305, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). As I have already found, however, the zoning regulations bear a rational relationship to legitimate planning objectives. The City's motion on this part of the equal protection issue must therefore be granted.

[26] Plaintiffs also allege that they have been denied procedural due process in that the City has deprived them of their "vested property rights to develop Queen's Beach pursuant to the 1966 DLUM agreement and the City land use regulations pursuant to 1982." This

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plaintiffs are not entitled to procedural due process protection because in passing zoning regulations the City was acting in a legislative, as opposed to an administrative, capacity.

The Supreme Court and lower courts have long distinguished between administrative and legislative action, because our theory of government assumes that people are assured input into the legislative process which seeks to balance the varied interests of society at large. Administrative actions, on the other hand, are those that affect only one or a few people and are case-by-case, so they do not involve a relatively large number of affected people to guard against unreasonable government action. As Justice Holmes observed in *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441., 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915):

> Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.

(ftn. continued)
claim is addressed *infra* section VIII under the discussion of plaintiffs' Contract Clause claims.

Many court, including the Ninth Circuit and the Supreme Court, have held that the enactment of a general zoning ordinance is a legislative act. *Eastlake v. Forest City Enterprises,* 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976); *Ebel v. City of Corona,* 698 F.2d 390 (9th Cir. 1983); *Rogin v. Bensalem Township,* 616 F.2d 680, 693 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981).[27] Similarly, the Hawaii Supreme Court held that the enactment of and amendments to the General Plan or DLUMs constitute legislative process. *Kailua Community Council v. City and County of Honolulu,* 60 Hawaii 428, 591 P.2d 602 (1979) (holding the Hawaii Administrative Procedures Act inapplicable to actions by the city council and chief planning officer).

[12] The general plans, DLUMs, and zoning codes at issue here were all enacted by ordinances. They "constitute general statements of [City] policy rather than specific applications of policy to a particular landowner, and therefore can be characterized only as legislative acts" to which Bishop may not claim any procedural rights. *Rogin v. Bensalem Township,* 616

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[27] Bishop has cited one case from an Illinois federal district court that, noting that it was very difficult to distinguish between legislative and administrative process in zoning actions, held that intervenors in a zoning action were entitled to some due process. Ultimately, the court held that they were not deprived of due process because they had a full hearing in court on the merits of their objections to the rezoning at issue. *Metropolitan Housing Development Corp. v. Arlington Heights,* 469 F.Supp. 836, 858-862 (N.D.Ill. 1979), *aff'd,* 616 F.2d 1006 (7th Cir. 1980).

This case is clearly distinguishable from ours. In *Arlington Heights,* the board did not follow its normal zoning and annexation procedures and instead entered into negotiations for a consent decree. Additionally, the zone change involved only one specific piece of property; it was not part of widely applicable zoning ordinances or plans, as are the regulations at issue here.

F.2d at 693.[28]

Bishop argues that the regulations more severely burden them than other landowners. This claim is irrelevant. The mere fact that general zoning regulations may have a differential impact on Bishop does not entitle them to procedural safeguards where none are due. Our democratic system is founded on compromise and decisionmaking that is intended to produce the most equitable results overall. Our system would simply fall apart if every person disgruntled by a general law or regulation could claim rights to procedural due process.

In contrast to the legislative enactment of zoning ordinances or general plans, city activity, involving specific building permits or variances is administrative in nature since it involves the application of zoning regulations to a specific parcel of property. However, Bishop has not alleged any procedural due process violations with respect to the denial of building permits or specific variance requests.

Bishop also asserts that it is entitled to procedural safeguards, not just with respect to the actual zoning regulations, but with respect to all of the City's activities at Queen's Beach. These claims are appropriately considered under Bishop's cause of action for inequitable precondemnation activity.

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[28] Bishop argues that the decision to downzone Queen's Beaach involved a specific parcel of land, and so the safeguard of legislative action was not present. However, this downzoning came as part of a development plan for all of east Honolulu and a comprehensive zoning code, and thus did affect the general populace.

VII

BISHOP HAS ALREADY RECEIVED SIGNIFICANT MONETARY GAINS

[13] The City argues that even if Bishop's claims were ripe it still would not be entitled to any compensation for its losses at Queen's Beach. The City argues that the taking inquiry asks whether "justice and fairness" require that the public at large, rather than the individual property owner, bear the burden of government regulation. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124-25, 98 S.C.t 2646, 2659-60, 57 L.Ed.2d 631; *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980). The City argues that, in determining whether there has been a taking, a court should measure a landowner's interest in the whole parcel, not in an isolated tract that he may not be able to develop as he would wish. Under this view, Kaiser asserts, Bishop has already received enough money from the development at Hawaii Kai generally and the City's actions at Queen's Beach do not deny it the economically viable use of its land or "interfere with reasonable investment-backed expectations." *Williamson County,* 105 S.Ct. at 3119.

The City draws from a number of cases to support its contentions. In the *Penn Central* case, the Supreme Court held:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature

> and extent of the interference with rights in the parcel as a whole.

Penn Central Trasportation Co., 438 U.S. at 130, 98 S.Ct. 15 2662.

The Ninth Circuit has also recognized that a court must focus on the property as a whole. In *MacLeod v. Santa Clara County*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009, 105 S.Ct. 2705, 86 L.Ed.2d 721 (1985), the court noted that the Supreme Court has

> long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the investment-backed expectations of a claimant that government deprivation of the rights to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole.

This recitation of the doctrine only takes the City so far, however. The takings question is an inherently fact-based inquiry. The determination whether to treat land as a single parcel for determining its value depends on numerous factors, such as unity of use, contiguity, physical characteristics, historical considerations, and how the land has been treated both by the landowner and by the government.

The cases cited by the City are distinguishable from Bishop's situation.[29] Here, the primary factor support-

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[29] In *Penn Central Transportation Co.*, 438 U.S. at 104, 98 S.Ct. at 2649, the Supreme Court held that "air rights" above a piece of property do not constitute a separate property interest.

In *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009, 105 S..Ct. 2705, 86 L.Ed.2d 721 (1985), the plaintiff bought a single parcel of land, consisting of two ranches. He continued the historic use of the property by leasing it out in its entirety for cattle grazing. Subsequently he entered into an

(continued)

ing the single parcel theory is that Bishop owns the property as a whole. However, Queen's Beach is non-contiguous since it is separated from the rest of Hawaii Kai by a road; Queen's Beach has not been developed by Bishop as part of the residential community of Hawaii Kai; Bishop and Kaiser have always considered Queen's Beach a separate area on which they seek to build a resort. Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes.[30]

(ftn. continued)
agreement with a lumber company to harvest timber on the property, but the county denied his application for a use permit. The Ninth Circuit recited the *Penn Central* rule, but did not seem to apply it. Instead it found that the denial of a permit to harvest timber did not interfere with the two present and primary uses of the property — grazing and investment — and thus that it did not interfere with his primary investment-backed expectations concerning the use of the property. 749 F.2d at 547.

In *Deltona Corp v. United States*, 657 F.2d 1184, 228 Ct.Cl. 476, (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982), the court held that the plaintiff had not been deprived of the economically viable use of his land because he had been able to develop over 80% of it and had doubled the market value of the property. In this case, however, plaintiff bought a 10,000 acre parcel in the Florida Gulf for development into a water-oriented residential community. The master plan called for a wholly-integrated community of homes, shops, schools and parks, but for development purposes, the plaintiff had divided his land into five construction areas which were to be built consecutively. Plaintiff was granted permits for three of the development areas, but was subsequently denied permits for the remaining two because of stricter federal environmental laws.

[30] In this regard, Bishop is in a similar situation to the plaintiff in *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). In this case, which was decided before *MacLeod*, the plaintiff owned the "Point" and the "Spit," two contiguous parcels of property. The city council determined that the county should keep the Spit permanently as open space, and the county general plan incorporated this concept. Further, the county zoned the Spit separately for very low density housing, while the

(continued)

The City has zoned Queen's Beach for preservation uses, while most of the rest of Hawaii Kai is zoned residential, and Queen's Beach has consistently had a different land use designation from the rest of Hawaii Kai. Under the General Plans of 1960 and 1964, under the DLUMs of 1964 and 1966, under the 1973 revised City Charter, and under the 1983 Development Plan, for example, Queen's Beach has been designated either commercial/resort or park/preservation, while the rest of Hawaii Kai has been designated primarily for residential use. In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking.

VIII

CONTRACT CLAUSE

Plaintiffs allege that the 1982 amendments to the General Plan, the enactment of the East Honolulu Development Plan, the withdrawal of the right to build a resort at Queen's Beach, and other acts of the City have violated their constitutional rights under the Contract

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(ftn. continued)
Point was zoned for higher density housing. The Ninth Circuit never actually determined whether the Point and the Spit should be considered one parcel, but it noted that the differential zoning tended to require their separate evaluation for takings purposes. The court also noted that a key consideration would be whether the parcels would be treated separately at the development stage by the plaintiff and the county, but that it could not determine this yet because the plaintiff had not submitted a development plan. 653 F.2d at 371.

Clause.[31] They argue first that the City has acted to impair the obligation of Bishop's contract with Kaiser for the development of Queen's Beach, and second, that the City has acted to impair its own contractual obligations to Kaiser and Bishop pursuant to the DLUM agreement. Neither of these claims has merit.

The Contract Clause provides that: "No State shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. Const. art 1, § 10. The Supreme Court has set out a three-part test for determining whether a state's (or subdivision's) regulations work such an impairment. The threshold inquiry is whether the law has operated as a substantial impairment of a contractual relationship. If so, then a court determines whether there is a significant and legitimate public purpose behind the regulation and whether the adjustment of the rights and responsibilities of the contract is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the regulation. Where the contract involves the state, the court must scrutinize the purpose more carefully. Where, as here, the contract only involves private parties and the legislation involves social or economic welfare, the court defers to the legislative judgment as to the necessity and reasonableness of the measure. *See, e.g., Energy Reserves Group Inc. v. Kansas Power and Light,* 459 U.S. 400, 410-13, 103 S.Ct. 697, 703-05, 74 L.Ed.2d 569 (1983); *Allied Structural Steel Co. v. Spannous,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); *Troy Ltd. v. Renna,* 727 F.2d 287, 296-98 (3d Cir. 1984).

[14] The City argues that plaintiffs cannot get past the first step because the regulations have not acted on

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[31] The fact that Kaiser does not have a property interest at Queen's Beach does not preclude it from asserting its contract clause claims, which are based on its Development Agreement with Bishop.

the contract to adjust the rights and responsibilities of Kaiser and Bishop. In order to have a constitutionally protected impairment, the law has to act on the contract itself, as distinguished from the subject matter of the contract. An otherwise valid law is not unconstitutional merely because an object of regulation is also the subject of a contract. *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 680 (1st Cir. 1974).

It appears that plaintiffs have confused impairment of the performance of their development agreement with impairment of the obligation of the contract. As one court has explained,

> The contract clause of the federal Constitution does not bar all governmental action affecting profitability of private contracts, even where the effect of such action is to diminish the likelihood that one or more of the parties will keep their bargain. Rather, the clause forbids an alteration in the relative position of two parties to an existing contract.

Metropolitan St. Louis Sewer District v. Ruckelshaus, 590 F.Supp. 385, 389 (E.D.Mo. 1984). *See also South Terminal Corp.*, 504 F.2d at 679-80; *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 311-12 (8th Cir. 1978).

[15] As the City points out, the zoning regulations did not alter the terms of the contract between Bishop and Kaiser, but simply affected the uses which could be made of Queen's Beach. Thus the regulations only affect the property which is the subject matter of the contract. Kaiser still has the contractual rights to develop at Hawaii Kai, if it can get the necessary approvals; Bishop still has the obligation to allow the development; the financial arrangements between the parties remain unchanged. Indeed, the City's actions may have made performance of the contract less

profitable and less likely, but this gives rise only to an action between the parties for breach of contract — not a constitutional claim.

Plaintiffs' second claim is that the City has acted to impair its own contractual obligations to Bishop and Kaiser pursuant to the DLUM to allow them to develop a resort at Queen's Beach. As has been discussed, however, the DLUM was not the equivalent of a zoning ordinance, and moreover, zoning ordinances are not contracts with developers. It is simply not within the City's power to contract away essential police powers, such as the ability to make future zoning decisions. The City had no contractual obligations with Kaiser or Bishop in this regard.

CONCLUSION

In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning inequitable precondemnation activities.

Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County;* that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

An appropriate order shall be submitted to the court by defendant through plaintiffs and plaintiffs/intervenors. In the event that the parties are not able to agree upon the form of the order, a conference to settle the order will be held upon request.

APPENDIX F

THE HONOLULU ADVERTISER
SEPTEMBER 21, 1990, PAGE 1

CITY, STATE TO TAP GOLF COURSE DEVELOPERS FOR RENTAL HOUSING

A $100 million 'premium' for each proposed

By Andy Yamaguchi
Advertiser Capitol Bureau

Gov. John Waihee and Mayor Frank Fasi, two sometimes-bitter political rivals, yesterday joined forces in an effort to get golf course developers to pay for rental housing.

Future golf course developers will be required to pay a "premium" of perhaps $100 million per course, Waihee, Fasi and City Council Chairman Arnold Morgado said in a rare joint news conference in the Council chambers.

But such premiums are on shaky legal ground, said University of Hawaii law professor David Callies, an authority on land-use law.

Waihee pointed to two proposed projects that could use the money:

• A complex of perhaps 1,000-plus apartments on land currently occupied by the main police station on Beretania Street and the nearby state Department of Agriculture.

• About 500 apartments, some set aside for University of Hawaii faculty, at the Kapiolani Community College site on Kapiolani Boulevard.

Who will collect the money and build the apartments? The officials said a task force will be appointed to work out the details.

State planning director Harold Masumoto said the city will probably collect the premium at the zoning stage.

The point, Waihee said, is that a joint city-state policy will send a stronger message to developers and hopefully get more bang for the buck.

"We could have gone our separate ways," Waihee said. "But the impact would not have been so great."

Said Fasi, "This is the goal: Use golf-course premium money to build rental housing. . . . Probably we should be emphasizing most of our effort on rentals." The Honolulu market has a 1 percent to 3 percent vacancy rate, one of the tightest in the country.

A $100 million fee, originally proposed by Fasi, is not cast in stone; there will probably not be a flat fee.

"I think for some courses, $100 million would not be unreasonable," Waihee said. Fasi said, "There's going to be a lot of give-and-take as to what will be a fair economic impact fee on golf courses, especially by foreign developers."

Law professor Callies was interviewed by The Advertiser before yesterday's announcement, on the increasing number of "impact fees" charged to developers of housing, hotels and, soon, golf courses.

Callies said if an impact fee is greater than a project's actual effect on such things as roads, utilities and the environment, the fee could be considered an unconstitutional "taking" of property without just compensation.

"I would be surprised if someone could come up with $100 million worth of impacts (from a golf course)," Callies said.

Waihee offered this rationale: Golf courses "require large tracts of undeveloped land at, or near, locations which have scenic, recreational or cultural significance to the community. Golf course development also excludes further use of the land for housing and creates heavy demands on water, transportation, solid waste and energy facilities."

Fasi first broached the idea of hitting up golf course developers with a $100 million fee to help pay for public

golf courses, other public recreational facilities and perhaps affordable housing.

But while North Shore activist Ben Hopkins, who is challenging Waihee in tomorrow's Democratic gubernatorial primary, was ridiculing Waihee for "riding the coattails" of the Republican Fasi, the mayor shared the credit.

He said he and Waihee have been kicking around housing ideas for the past six months. "Surprisingly," Fasi said, "we've been thinking of ideas that are the same."

Hopkins also criticized Waihee for announcing the golf course plan two days before tomorrow's primary. Waihee called the timing a coincidence: "It's when we finally got the agreements worked out," Waihee said.

The city in 1987 proposed a 1,100-unit tower on the 3.9-acre site of the Pawaa Annex police station on Beretania Street. The idea has grown to include the state Department of Agriculture site at King and Keeaumoku, about seven acres all told.

The city is in the process of hiring a consultant to determine exactly what should be built there, Deputy Housing Director Gail Kaito said. Some preliminary ideas: close Young Street between Keeaumoku and Kalakaua and acquire some adjoining private land for a sort of "superblock."

At the old Kapiolani Community College campus, the state has preliminary plans for about 500 apartments after the remaining KCC functions there move to the new Diamond Head campus, said Harold Edwards, development coordinator for the state's Hawaii Community Development Authority.

Advertiser Capitol Bureau Chief William Kresnak contributed to this story.

No. 90-1078

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. BISSELL CAREY, III
Counsel of Record
STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
(808) 527-5688

Attorneys for Respondent

Printed by
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60 Connecticut Boulevard
East Hartford, CT 06108
528-4264

QUESTIONS PRESENTED[1]

1. Did the courts below err in concluding that a cause of action for inequitable precondemnation activities requires proof of no economically viable use?

2. Did the court of appeals err in concluding that "unconstitutional exaction" was not raised as a separate claim before the trial court?

3. Did the courts below err in concluding that certain of Petitioners' claims were not ripe for federal adjudication?

[1] These are the true questions presented, absent the hyperbole and misstatements contained in Petitioners' questions presented.

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TABLE OF AUTHORITIES (continued)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioners Richard Lyman, Jr., et al., Trustees of the Bernice P. Bishop Estate ("Bishop"), filed an intervening complaint in this case on July 19, 1985. The claims of Bishop parroted those of Kaiser Development Company, et al. ("Kaiser"), the original plaintiff in this action. Read liberally, those claims sought relief pursuant to 42 U.S.C. § 1983 based on allegations that the land use regulations and other conduct of Respondent City and County of Honolulu ("the City") violated Bishop's rights involving a certain parcel of land known as "Queen's Beach" under the Fifth and Fourteenth Amendments to and the Contract Clause of the United States Constitution.

The City filed motions for summary judgment pertaining to all claims of Bishop and Kaiser. In its decision on the City's motion against Bishop, the United States District Court for the District of Hawaii (Honorable Samuel P. King, Judge) held as follows:

> Specifically, I find that . . . plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. -

926, 949 (D. Haw. 1986) (Petitioners' Appendix E at E 52).[2]

However, relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146-47 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), the court held that Bishop's "inequitable precondemnation activities" claim was not subject to the Supreme Court's "finality" requirements. 649 F. Supp. at 943 (Appendix E 37-38). The court, therefore, denied summary judgment against Bishop as to that claim.[3]

After the City's motion to enter judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was denied on November 13, 1986, Bishop's remaining claim went to trial before Judge King and a jury on June 26, 1987. At the conclusion of Bishop's case, the City moved for a directed verdict. The trial court granted the City's motion (Petitioners' Appendix C at C 6), and, subsequently, entered judgment dismissing Bishop's remaining claim.[4]

The district court's written decision and order granting the City's motion for directed verdict concluded that Bishop had failed to establish that an official intent existed to acquire any portion of Queen's Beach prior to passage of the 1982 General Plan (Appendix C 4);[5] that, in order to succeed on its

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[2] References are made throughout this brief to Petitioners' Appendix. Specifically, reference is made to Petitioners' Appendices A and B (decisions by the court of appeals), to Petitioners' Appendix C (decision by the district court on the City's motion for directed verdict), and to Petitioners' Appendix E (decision by the district court on the City's motions for summary judgment).

[3] The district court granted summary judgment against Kaiser on all of its claims. 649 F. Supp. at 949 (Appendix E 52).

[4] Bishop's statement of the case indicates that the district court directed a verdict against it on its "remaining claims." *See* Bishop's Petition, p. 5. Presumably, Bishop is referring to claims under both the Fifth and Fourteenth Amendments for inequitable precondemnation activities. The so-called "*Nollan* claim" was not raised at trial. *See infra* Section II.

[5] Bishop did not appeal from this decision. Curiously, Bishop nevertheless dedicates the vast majority of its statement of facts to a hyperbolic description of pre-1982 conduct by various City personnel and agencies.

claim, Bishop was required to present evidence from which a fact-finder could reasonably conclude that Queen's Beach or a portion thereof was "taken" by the City (Appendix C 3); that, in order to prove a "taking," Bishop was required to present evidence that no economically viable use of Queen's Beach was available (Appendix C 5); and that Bishop had failed to do so. (Appendix C 5).

Bishop appealed to the Court of Appeals for the Ninth Circuit from both the district court's summary judgment as to all but one of its claims and from the district court's decision directing a verdict against it on its one remaining claim.

With regard to the district court's decision granting summary judgment, the court of appeals affirmed for the reasons stated in the district court's decision. *Kaiser Dev. Co. v. City and County of Honolulu*, 898 F.2d 112, 113 (9th Cir. 1990) (Petitioners' Appendix A at A 2).[6] In reaching its decision, the court of appeals reviewed cases decided subsequent to the district court's decision and concluded that none of those cases changed the validity of the district court's reasoning. *Id.* at 113 (Appendix A 2).

In a separate opinion addressing Bishop's claims of error in connection with the trial court's granting of the City's motion for directed verdict, *Kaiser Dev. Co. v. City and County of Honolulu*, 913 F.2d 573 (9th Cir. 1990) *(per curiam)* (Petitioners' Appendix B), the court of appeals concluded, as did the trial court (Appendix C 5), that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property. 913 F.2d at 575 (Appendix B 9). Having reached that conclusion, the court of appeals held, as did the trial court (Appendix C 5), that Bishop did not offer any substantial evidence that it had no economically viable use for its property. 913 F.2d at 576 (Appendix B 10). The court of appeals also

[6] Bishop's assertion that the decision by the court of appeals "[a]stonishingly . . . contains no holding" is groundless. *See* Bishop's Petition, p. 1 n.2. The court of appeals held that "[t]he decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Appendix E]." 898 F.2d at 113 (Appendix A 2).

concluded that Bishop did not raise an "unconstitutional exaction" claim at trial. *Id.* (Appendix B 10-11). Finally, the court of appeals concluded that the district court did not abuse its discretion in excluding certain evidence at trial. *Id.* (Appendix B 10).

Following the decision by the court of appeals, Bishop filed a petition for rehearing and suggestion for rehearing *en banc.* Therein, Bishop challenged the court of appeals' conclusion that its inequitable precondemnation activities claim required proof that there is no economically viable use of the subject property.[7] Bishop also contended in its petition for rehearing that an unconstitutional exaction claim was raised at trial.[8] Bishop's petition for rehearing was denied, and its suggestion for rehearing *en banc* was rejected. *Id.* at 574 (Appendix B 6).

Bishop has now petitioned this Court for a writ of certiorari.

STATEMENT OF FACTS[9]

A. The Subject Property: Queen's Beach

Petitioners own approximately 6,000 acres of land, now known as "Hawaii Kai," on the island of Oahu, State of

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[7] Bishop also suggested that that conclusion created a conflict within the Ninth Circuit, but *see infra* note 31 and accompanying text.

[8] Bishop's petition for rehearing could also be read to challenge the court of appeals' conclusion that the trial court did not abuse its discretion in excluding certain evidence at trial. The court of appeals' conclusion, given the limited standard for appellate review of evidentiary questions, *see, e.g., Roberts v. College of the Desert,* 870 F.2d 1411, 1418 (9th Cir. 1988), certainly was the proper one, and, based on its questions presented, Bishop does not appear to be pursuing those evidentiary issues with this Court.

[9] Bishop's statement, *see* Bishop's Petition, p. 5 n.6, that the City, in its Appellee's Brief, did not dispute the facts as presented by Bishop to the *(continued)*

Hawaii.[10] The subject property is a 209.4 acre parcel in Hawaii Kai known as "Queen's Beach." Queen's Beach is vacant, undeveloped land.

B. Land Use Plans Applicable To Queen's Beach

As required by the 1959 Charter of the City and County of Honolulu, a General Plan for Oahu was enacted by ordinance effective May 7, 1964 ("1964 General Plan"). Immediately thereafter, a Detailed Land Use Map for the Hawaii Kai area was enacted, which was later amended ("1966 DLUM"). The 1966 DLUM showed potential land uses for Hawaii Kai. It designated approximately 100 acres of Queen's Beach for future resort use, five acres for future commercial use, and ninety-five acres for park and golf course use.

Effective January 2, 1973, the Revised Charter of the City and County of Honolulu ("1973 Charter"), as approved by the City's citizens, by a referendum vote held on November 7, 1972, became law, supplanting the 1959 Charter. On October 28, 1975, the City amended by ordinance the 1964 General Plan to clarify that DLUM's were not to be regarded as zoning

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[9] (continued)
court of appeals is patently false. It is clear from the following excerpt from the City's Appellee Brief that the City did dispute Bishop's "facts":

> [T]he City urges the court to carefully examine those portions of the record cited by Bishop Estate in support of its "facts." In large part, the record fails to support them as stated. Because of the page limitation on the City's Brief, however, it is virtually impossible to address the multitude of overstatements and misstatements of facts contained therein.

Brief for Appellee at 7 n.5. Not surprisingly, the City still finds itself confronted with the task of addressing a multitude of overstatements and misstatements of fact.

[10] On April 27, 1961, Bishop entered into an agreement with Kaiser. That agreement designates Kaiser as Bishop's "independent contractor to subdivide, develop and improve" Hawaii Kai pursuant to the terms, most of them restrictive, of the agreement.

Bishop's claimed motivation for entering into the agreement with Kaiser, *see* Bishop's Petition, p. 3, was not presented in any form to the courts below. Accordingly, it should have no bearing upon this Court. *See Commissioner v. McCoy*, 484 U.S. 3, 6, *reh'g denied*, 484 U.S. 982 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)

maps, and were not to be considered as having priority over the provisions of the General Plan. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

On February 2, 1977, pursuant to the 1973 Charter, a General Plan for the City ("1977 General Plan") was adopted by resolution of the City Council.[11] That General Plan specifically identified Queen's Beach as a possible site for future resort development. On December 23, 1982, also pursuant to the 1973 Charter, the 1977 General Plan was amended ("1982 General Plan"). The 1982 General Plan differed from the 1977 General Plan in several respects, including the fact that Queen's Beach was not specified as a possible site of future resort development. Hence, until the passage of the 1982 General Plan, portions of Queen's Beach were planned for future resort use, but the zoning for all of Queen's Beach, while permitting residential use, did not permit resort use.[12]

As also required by the 1973 Charter, the City began in 1977 the process of formulating Development Plans for all areas of the City, including East Honolulu, which encompasses all of Hawaii Kai, including Queen's Beach.[13] In 1979, the

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[11] The 1973 Charter provides that the General Plan contain:

> [T]he city's broad polices for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, state or federal. The statements shall include but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[12] For a full discussion of zoning ordinances applicable to Queen's Beach *see infra* Statement of Facts, Section C.

[13] Development Plans, as they were eventually formulated, are comprised of three elements: a written portion, which describes the area to which it is applicable as well as that area's long range goals, specific problems and planned future development; a land use map, which shows in pictorial form the future land uses for the area; and a public facilities map, which shows in pictorial form the area's existing public facilities and planned future public facilities.

City's Department of General Planning ("DGP") made public its proposed Development Plan Land Use Map for East Honolulu. This Development Plan Land Use Map proposed that a portion of lower Queen's Beach be designated for future resort uses and that the remainder of the property be designated for future preservation uses. In 1980, DGP proposed another Development Plan Land Use Map for East Honolulu containing the same designations for Queen's Beach ("1980 Proposed DP"). This proposed plan was submitted to the City Council, which, pursuant to the 1973 Charter, was required to enact Development Plans as ordinances. The 1980 Proposed DP was not adopted by City Council. Instead, the City Council passed a Development Plan Land Use Map for East Honolulu that was essentially consistent with a proposed land use plan submitted by Kaiser (without, incidentally, Bishop's approval) and that designated a portion of Queen's Beach for future resort uses and the remainder for future single-family residential uses. This Development Plan was vetoed by the Mayor (along with all but one of the seven other proposed Development Plans for the Island of Oahu passed by the City Council at the same time), for, among other reasons, its failure to adequately reflect the requirements of the 1977 General Plan.

In April, 1982, after reviewing input from both Bishop and Kaiser,[14] DGP made public another proposed Development Plan Land Use Map for East Honolulu ("1982 Proposed DP"), which eliminated future resort uses at Queen's Beach. Instead, it proposed that approximately eighty acres of Queen's Beach be designated for future park uses and that the remaining area of Queen's Beach be designated for future

[14] In rejecting Bishop's suggestion that the 1982 Proposed DP mirror the 1966 DLUM, DGP was not denying Bishop "uses expressly permitted by existing law. . . ." *See* Bishop's Petition, p. 9 n.14. After all, permitted uses are controlled by zoning, and the DLUM's were not to be regarded as zoning maps. *See* City and County of Honolulu Ordinance No. 4517; *Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

preservation uses.[15] On May 10, 1983, the 1982 Proposed DP, with minor changes, was adopted as the Development Plan Land Use Map for East Honolulu. That map reflected the fact that the 1982 General Plan had *not* identified Queen's Beach as a future resort site.

C. Zoning Ordinances Applicable To Queen's Beach

Applicable zoning has at all relevant times permitted development of Queen's Beach. Beginning in 1943, Queen's Beach was zoned to permit single-family residential uses. That zoning was in effect until March 1, 1984, when the zoning of Queen's Beach was amended to permit preservation uses. Preservation zoning allows many possible uses, such as public and private golf courses, vacation cabins and uses that are accessory to those uses.[16]

D. Efforts To Develop Queen's Beach[17]

Prior to 1971, Bishop made no effort to gain the necessary approvals to develop Queen's Beach. On or about February 8, 1971, Bishop applied to the City for a zone change on sixteen parcels in Hawaii Kai, including a request that 42.4 acres of lower Queen's Beach be rezoned for resort and

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[15] Bishop's contention that the City "designated Queen's Beach as 'Park' and 'Preservation,' and refused to permit any economically viable private use," *see* Bishop's Petition, p. 4, is without merit for at least two reasons. First, the City did not "refuse" anything. Rather, Bishop never sought to develop the property under the existing land use regulations. *See infra* Section III.A. Second, Bishop failed to prove that there were no economically viable uses under those regulations. *See infra* note 27 and accompanying text.

[16] For a complete list of preservation uses *see* 649 F. Supp. at 929 n.4 (Appendix E 4-6 n.4).

[17] Bishop is, perhaps, most disingenuous in its description of its efforts to develop Queen's Beach. *See, e.g.*, Bishop's Petition, pp. i, ii n.1, 28. Bishop made only *two* specific applications for zone changes or development of Queen's Beach, *not seven*. Therefore, a patently false "fact" has been woven throughout Bishop's petition, beginning with all three of its questions presented.

commercial uses.[18] That application was met with substantial public opposition, including that of elected State legislators. The City deemed that application to be withdrawn as of July 10, 1971.[19]

No application has ever been submitted to the City to develop lower Queen's Beach in accordance with applicable zoning.[20] Only one application was ever submitted to the City to develop upper Queen's Beach, and that was submitted on March 18, 1983, in a now admitted, *see* Bishop's Petition, pp. 9-10, race of diligence with the proposed East Honolulu Development Plan, seeking approval to develop a single-family residential subdivision across approximately 120 acres of upper Queen's Beach. This one application was denied on May 19, 1983, after the May 10, 1983 enactment of the East Honolulu Development Plan had designated that portion of Queen's Beach for preservation uses.[21] Kaiser appealed the denial to the zoning board of appeals, which upheld the denial on March 8, 1984. Bishop never appealed that denial to Hawaii's state courts.[22]

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[18] The City was not, as Bishop suggests, *see* Bishop's Petition, p. 6 n.8, required to zone Queen's Beach in conformance with the General Plan and the 1966 DLUM. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

[19] The City did not, as Bishop claims, refuse to consider the application. *See* Bishop's Petition, p. 6. By a letter dated May 24, 1972 to the City's Planning Department, Kaiser requested that a public hearing on its application be postponed, indicating that a revised application would be forthcoming. It never requested that the original application be processed any further. Thereafter, this application was considered withdrawn by the City.

The 1971 application was the only attempt to secure zoning for a resort at Queen's Beach. Therefore, Bishop's contention that "the City prohibited development of the resort," *see* Bishop's Petition, p. 4, is, at least, an overstatement.

[20] Lower Queen's Beach is the "makai," or "toward the ocean," portion of Queen's Beach comprised of roughly eighty acres.

[21] The application was denied on specified grounds set forth in a written decision, none of which were in any way related to proposed dedication of property.

[22] Knowing that from 1971 to the institution of this litigation only two applications were actually filed, Bishop's statement that its development

(continued)

E. The Alleged Unconstitutional Conduct

The City is a governmental body which has distinct legislative and executive branches, and the latter has a number of agencies, all as established and described by state law. Bishop, in its petition, makes no effort to delineate the final policy-making authority of the various components of the City's governmental structure, let alone establish where final authority rests in the areas of land use planning and regulation and the exercise of eminent domain authority. Rather, Bishop unjustifiably characterizes the acts or conduct of City personnel upon which it relies as that of "the City."[23]

In fact, all that Bishop is able to show is that certain individuals or agencies within the City government, at various times, personally desired a park at Queen's Beach. For instance, Bishop introduced evidence to show that, in 1973 and again in 1975, the Deputy Director of the City's Parks Department desired a thirty-seven acre park at Queen's Beach.[24] Neither

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[22] (continued)
applications "made it a convenient target" becomes rather ludicrous. *See* Bishop's Petition, p. 18 n.24. The same holds true with regard to the statement that "[e]very conceivable type of land use was applied for at one time or another. . . ." *See* Bishop's Petition, p. 11. Aside from the fact that it only made two applications, Bishop also overlooks its obvious failure to apply for any of the potential uses allowed by present zoning. *See infra* Section III.A.

[23] For example, following its discussion of Deputy Parks Director Ramon Duran's 1975 press release, Bishop proclaims that "the City thus conceded its unlawful purpose to blight the subject property." *See* Bishop's Petition, p. 7 n.11. Certainly, Mr. Duran and "the City" are not interchangeable terms. The trial court recognized this at trial when it warned Bishop that "[i]f you're relying upon [Mr. Duran] only to prove your case, you're in bad shape." (RT 15-41).

[24] Petitioners' repeated reliance on the "blackmail" expression says a lot about their candor in dealing with this Court. Mr. Duran used the term at his deposition, where it was stipulated by all parties, including Bishop, that the word had been used "facetiously."

Bishop also provides the Court with a September 21, 1990 newspaper article (Appendix F) in support of its statement that the City "will hence-
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this particular official, nor the Parks Department as a whole, was vested with authority to acquire park lands on behalf of the City. Further, no funds were ever appropriated by the City in furtherance of this person's wishes.

Bishop also introduced evidence of the conduct of City employees at DGP. Again, none of these individuals, nor DGP itself, was vested with authority to regulate or condemn lands within the City's jurisdiction, including Queen's Beach.

None of the individual acts complained of rose to the required level of official action.[25] The district court concluded that no official action regarding a potential park at Queen's Beach was taken until 1982 (Appendix C 4), and the court of appeals, because of its findings on other issues, found it unnecessary to reach the issue.[26]

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[24] (continued)
forth" engage in conduct which Bishop has concluded would violate constitutional guaranties, conduct Bishop also says was "evidently" precipitated "by the courts' failure" to stop it. *See* Bishop's Petition, p. 15 n.20. Simply put, the article is irrelevant to the issues presented on appeal. As if that were not enough, Bishop misrepresents the content of the article, and the conclusions Bishop draws from the article are nothing more than an unjustified affront to the City and, more importantly, to the Court.

[25] One seeking relief from a municipality pursuant to 42 U.S.C. § 1983 is required to prove that the conduct or action allegedly causing the constitutional deprivation was pursuant to the municipality's official policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

[26] The court of appeals stated that: "Because we find that Bishop did not offer any substantial evidence that it had no economically viable use for its property, we need not decide if the City took official action here. *See Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977) (acknowledging 'official action' requirement for inequitable precondemnation claim and finding such action in that case)." 913 F.2d at 576 n.3 (Appendix B 10 n.3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURTS BELOW PROPERLY CONCLUDED THAT A CAUSE OF ACTION FOR INEQUITABLE PRECONDEMNATION ACTIVITIES REQUIRES PROOF OF NO ECONOMICALLY VIABLE USE.

In its decision, the court of appeals stated that "[a] cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has '"denie[d] [him] economically viable use of his land."' *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))." 913 F.2d at 575 (Appendix B 9). Accordingly, the court of appeals concluded, as did the trial court (Appendix C 5), that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property. 913 F.2d at 575 (Appendix B 9-10).[27] Although Bishop disagrees with that conclusion and has petitioned for a writ of certiorari on that basis, the courts below have reached the right conclusion.

As it did during argument on the City's motion for directed verdict, in its appellate briefs, in oral argument

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[27] Having reached the conclusion that Bishop's inequitable precondemnation activities claim required proof of no economically viable use, both the trial court and the court of appeals held that Bishop did not offer any substantial evidence that it had no economically viable use for its property. *See* Appendix C 5 and 913 F.2d at 576 (Appendix B 9-10).

In light of the holdings of both courts below, Bishop's assertion that "[e]ventually, Bishop Estate proved at trial that these ostensibly permitted uses were in fact infeasible," is a serious misrepresentation. *See* Bishop's Petition, p. 11 n.17. Further, with regard to the testimony of Bishop's expert witnesses, the trial court did not "insist" on anything. *See id.* Rather, the trial court ruled certain evidence inadmissible. Finally, the court of appeals did not "ignore the submission" of the claimed evidentiary error. *See id.* The court of appeals, in fact, found the exclusion of the evidence proper. 913 F.2d at 576 (Appendix B 10).

before the court of appeals and in its petition for rehearing, Bishop contends that proof of no economically viable use is not required as part of its inequitable precondemnation activities claim.[28] Rather than the availability of economically viable use, Bishop contends that the important elements of a claim for inequitable precondemnation activities are the bad faith or unreasonableness of the government's conduct. As the courts below have found, Bishop's contentions are wrong.

Bishop's contentions are wrong because Bishop does not extend its legal analysis of a claim for inequitable precondemnation activities far enough. Bishop's analysis begins and ends with the government's conduct. The impact of that conduct, however, must also be included in the analysis. Specifically, to establish liability for inequitable precondemnation activities, the impact of governmental conduct on the property must be so extensive that the property is regarded as "taken." *See, e.g., Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977); *Benenson v. United States*, 548 F.2d 939, 948 (Ct. Cl. 1977); *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 588 (Ct. Cl. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

A "taking," therefore, must be shown in order for Bishop to prevail under its inequitable precondemnation activities claim. The trial court so concluded (Appendix C 3-4), and the court of appeals agreed. 913 F.2d at 575 (Appendix B 8-9). The trial court also ruled that in order to show a "taking," the standard of no economically viable use, which is also applicable to regulatory takings claim, must be satisfied. (Appendix C 5). That is, Bishop was required to show that no economically

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[28] For prosecuting this particular claim, Bishop relied principally upon *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), and *Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327 (9th Cir. 1977). Interestingly enough, Bishop, in arguing that something less than the standard of no economically viable use is the appropriate standard for its remaining takings claim, no longer relies on either *Martino* or *Richmond Elks*.

viable use was available to the property. The court of appeals, citing the recent Supreme Court decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), and *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984),[29] again agreed with the trial court. 913 F.2d at 575 (Appendix B 9). *See also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980);[30] *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n.36, *reh'g denied*, 439 U.S. 883 (1978).

The conclusion that a cause of action for inequitable precondemnation activities, like a regulatory takings claim, requires proof of no economically viable use is the proper one,[31] and, therefore, Bishop's petition should be denied.[32]

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[29] Bishop cites *Kirby Forest* in support of its position that the standard for its inequitable precondemnation activities claim is something less than a denial of economically viable use. *See* Bishop's Petition, p. 25. *Kirby Forest*, however, lends no support to that position. 467 U.S. at 14-15.

[30] Bishop's suggestion that *Agins* endorses a standard other than the denial of economically viable use for claims of inequitable precondemnation activities is unavailing. *See* Bishop's Petition, p. 20. The clear implication of *Agins* is that, in order to succeed on its claim, Bishop was required to show that the City's precondemnation activities denied it economically viable use of Queen's Beach. 447 U.S. at 260, 261 n.9. While noting that the presence of "good faith planning activities" may vitiate liability, the *Agins* Court did not hold that an inquiry into good faith could replace the preliminary inquiry into the economic viability of uses.

[31] Far from creating the confusion and conflict complained of, *see* Bishop's Petition, p. 17, the decision in this case provides welcomed clarification regarding the elements of an inequitable precondemnation activities claim. By concluding that Bishop's inequitable precondemnation activities claim required proof that there is no economically viable use for the subject property, the court of appeals implicitly found what the trial court clearly stated; namely, "substantial interference," as that term is used in *Martino*, 703 F.2d at 114, and *Richmond Elks*, 561 F.2d at 1330, in the context of an inequitable precondemnation activities claim, must, in order to be consistent with recent Supreme Court decisions such as *Nollan*, *Kirby Forest*, *Agins* and *Penn Central*, be read as "no economically viable use." (Appendix C 5).

[32] Bishop's reference to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and its statement that "[n]o reason appears why Honolulu should be able to accomplish what this Court held may not be done constitutionally by

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II. THE SO-CALLED *NOLLAN* CLAIM WAS NOT RAISED AS A SEPARATE CLAIM BEFORE THE TRIAL COURT.[33]

In its memorandum of decision, the court of appeals concluded that Bishop "failed . . . to specify at trial that it was pursing a *separate claim* based on unconstitutional exaction. We, therefore, have no factual record to assist us in ruling on this claim and hence do not reach this [claim]." 913 F.2d at 576 (Appendix B 10-11) (citations omitted and emphasis added). Bishop contends, in its petition for a writ of certiorari, that unconstitutional exaction was raised as a separate claim at trial. The conclusion reached by the court of appeals is, however, the proper one.

Bishop never did specify at the trial that it was pursuing a separate claim based on an unconstitutional exaction. Rather, Bishop always contended *at trial* that the conduct it now argues gives rise to its exaction claim was part of a "continuing course of conduct" giving rise to its inequitable precondemnation activities claim, not the basis of a separate and distinct claim for constitutional relief.[34] That earlier contention, unlike the present contention, was, of course, entirely

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[32] (continued)
the federal government," *see* Bishop's Petition, p. 3 n.4, should be disregarded by the Court. In *Kaiser Aetna*, the Court found a taking through physical invasion of a privately owned marina. 444 U.S. at 180. No claim of physical invasion is being made herein, and, therefore, *Kaiser Aetna* has no bearing upon this case.

[33] A decision by the court of appeals that a claim was not raised at trial fails to satisfy the standards set forth in Rule 10 of the Rules of the Supreme Court of the United States governing review on a writ of certiorari. Since, however, those standards are "neither controlling nor fully measuring the Court's discretion," the City will respond to Bishop's argument.

[34] The remarks made by the City's trial counsel during opening statement to which Bishop makes reference in its petition, *see* Bishop's Petition, pp. 13-14, were in response to Bishop's continuing course of conduct claim as it was explained to the jury during Bishop's opening statement. Certainly, it would be much more probative for Petitioners to refer to specific instances where they articulated that the *Nollan* claim was being pursued at trial. Such proof is conspicuously absent from Bishop's petition.

consistent with the district court's ruling on the City's motion for summary judgment. Relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d at 1146-47, the district court held that Bishop's inequitable precondemnation activities claim was not subject to the Supreme Court's "finality" requirements, *see, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 472 U.S. 172 (1985), and, therefore, denied summary judgment *only as to that claim.* 649 F. Supp. at 943 (Appendix E 52) ("In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning inequitable precondemnation activities.")

The argument before the trial court on the City's motion for directed verdict is most instructive on this issue. Despite specific inquiry from the trial judge as to what claims were before the court,[35] not once did Bishop's trial counsel refer to a claim for unconstitutional exaction. In fact, in at least two instances, Bishop's trial counsel expressly stated that a claim for unconstitutional exaction *was not before the court.* The first instance involved the following exchange between the court and Bishop's trial counsel:

The court: Well, you're relying on *Martino*,[703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)] —

Mr. Jackson: Yes.

The court: Now, *Parks v. Watson*, [716 F.2d 646 (9th Cir. 1983)] too, I guess, huh?

Mr. Jackson: No, *Parks* was an unconstitutional exaction case.
(RT 36-57).

[35] Bishop's petition for a writ of certiorari repeatedly states that Bishop raised the *Nollan* claim "by every method known to law." *See* Bishop's Petition, pp. 16, 17, 19. Apparently, direct inquiries from the trial judge do not count.

In the second instance, Bishop's trial counsel made the following observation:

> *Mr. Jackson:* [W]e are now beginning to see the law begin to clear and the law is clearing in excessive exaction cases, under *Nollan,* [483 U.S. 825 (1987)] its clearing in over-regulation cases in *First Evangelical,* [482 U.S. 304 (1987)] and I submit that next case will be one like this, where there has been a course of conduct over a period of time that has culminated in not only temporary damages but a fee taking. . . .

(RT 36-64). Thus, the trial court did not address an unconstitutional exaction claim in its decision on the City's motion for directed verdict.[36]

Bishop's suggestion that the court of appeals reached a "wholly unjustified" and "baseless" conclusion simply does not withstand scrutiny. *See* Bishop's Petition, p. 19. The conclusion that an unconstitutional exaction claim was not raised at trial was fully supported by arguments made below. In its initial brief to the court of appeals, the City stated that "[Bishop] now seems to pursue a separate, independent claim of 'unconstitutional exaction,' whereas, at trial, it did not," Brief for Appellee at 10 n.9, and the City provided the court with an abundance of record cites to support that statement. Bishop, of course, had the opportunity to respond to the City's argument that unconstitutional exaction was not raised as a separate claim before the trial court in its reply brief, but Bishop failed to do so. The issue was then the subject of argument before the court of appeals.

The court of appeals, with the benefit of the aforementioned briefs and argument in addition to a full record review, concluded that Bishop did not raise the claim at trial. Bishop, unsatisfied with that result, availed itself of its right

[36] It should also be pointed out that the City did not address a claim for unconstitutional exaction in its motion for directed verdict or during argument thereon.

to petition for rehearing, and, as Bishop itself acknowledges, "[a]ll this was covered in [Bishop's] petition for rehearing." *See* Bishop's Petition, p. 13. That petition for rehearing was, of course, denied. 913 F.2d at 574 (Appendix B 6). The court of appeals had before it all of the arguments now being made to this Court and did not alter its conclusion that Bishop did not raise the claim at trial.[37]

Now, two levels removed from the trial court, Bishop's counsel of record continues to argue about what claims were presented at a trial in which he did not even participate. Just as the court of appeals was warned when faced with Bishop's petition for rehearing, so shall this Court be warned in light of Bishop's petition for a writ of certiorari. Do not fall prey to Bishop's desperate tactics, first alluded to by the City in its initial appellate brief. Therein, the City pointed out that the "continued lack of clarity of Bishop's claims is no doubt viewed by Bishop Estate as a means by which it can keep all doors open to possible appellate relief. . . ." Brief for Appellee at 11 n.10. It is time to close those doors once and for all by denying this petition.[38]

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[37] Bishop's request for a remand to the court of appeals on this issue is incredible. *See* Bishop's Petition, p. 19. There is no justifiable reason why the court of appeals should hear the same arguments for a third time.

[38] In connection with the *Nollan* claim, Bishop cites Haw. Rev. Stat. § 46-6 and the ordinance enacted pursuant thereto, the so-called Park Dedication Ordinance. *See* Bishop's Petition, p. 12. Since these issues could conceivably have some relevance to Bishop's inequitable precondemnation activities claim, the City will address them. First, by passage of § 46-6, the State did not limit the City's power to impose park dedication conditions in contexts other than residential subdivision applications. Second, the City simply did not violate the provisions of its Park Dedication Ordinance. Bishop's one subdivision application met the Ordinance's requirements. The application was denied for reasons totally unconnected with noncompliance with statutory dedication requirements.

For similar reasons, the City will also respond to Bishop's argument that there was "no reasonable nexus" between a park and resort development. *See* Bishop's Petition, p. 12. It is clear that a municipality may not condition the grant of a land use permit or approval upon the concession by the applicant of a constitutionally guaranteed right unless the concession bears a rational relationship to the goals served by the permit or approval require-

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III. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF BISHOP'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION.

In affirming the district court's decision granting summary judgment against Bishop, the court of appeals stated: "The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Petitioner's Appendix E]." 898 F.2d at 113 (Appendix A 2). By affirming the district court's decision granting summary judgment against Bishop "for the reasons stated by Judge King," *id.* (Appendix A 2), the court of appeals affirmed the district court's dismissal of all but one of Bishop's claims based upon the finding that "[Bishop's] claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]." 649 F. Supp. at 949 (Appendix E 52). Despite Bishop's complaint that the ripeness standard has become a "puzzle," *see* Bishop's Petition, p. 16, the court of appeals and the district court properly found that certain of Bishop's claims are not ripe for federal court review.

A. Bishop Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Bishop Ever Sought A Variance From Preservation Zoning.

Far from being a "puzzle," the standard for when a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is well-settled. Two conditions must be satisfied. First, such claims are not ripe until the landowner has received:

"[A] final and authoritative determination of the type

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[38] (continued)
ment. *Nollan*, 483 U.S. at 836. However, in no instance described by Bishop was City approval of any governmental benefit conditioned upon dedication of all or any portion of Queen's Beach. Without that essential prerequisite, there is no need to undertake the rational relationship analysis.

and intensity of development legally permitted on the subject property."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). *Accord Williamson County Regional Planning Comm'n*, 473 U.S. at 180, 190 n.11; *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, *amended*, 841 F.2d 872, 876 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988); *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Herrington v. Sonoma County*, 834 F.2d 1483, 1499 (9th Cir. 1987), *amended*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). As this Court has explained: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. In other words, " 'the nature and extent of permitted development' " must be "expose[d]" by virtue of the municipality's final decision. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348).

The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix A 2), that the Petitioners "have not submitted a development plan under the present land use regulations, which list at least twenty possible uses for the land. . . ." 649 F. Supp. at 940 (Appendix E 31). Bishop has, therefore, failed to obtain a final and authoritative determination of " 'the nature and extent of permitted development' " at Queen's Beach. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348). By failing to expose the extent of permitted development, Bishop has failed to satisfy the so-called "final decision requirement." *Herrington*, 834 F.2d at 1496.[39]

[39] Bishop maintains that it is a "mystery" how summary judgment could be granted on a point on which there was a conceded factual dispute. *See (continued)*

Bishop's shortcomings do not end there. The final decision requirement also requires a plaintiff to show that it has applied for and been denied a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 187-88; *Kinzli*, 818 F.2d at 1454). *Accord Lai*, 841 F.2d at 303; *Austin*, 840 F.2d at 680; *Shelter Creek Dev. Corp.*, 838 F.2d at 377. The district court found, and the court of appeals again agreed, 898 F.2d at 113 (Appendix A 2), that Bishop has never sought a variance from the regulations at issue, 649 F. Supp. at 942 (Appendix E 31), although Bishop has been able to apply for such a variance pursuant to § 6-1009 of the 1973 Charter. As this Court stated in *Williamson County Regional Planning Comm'n:* "[I]t is impossible to determine the extent of the loss or interference until the [municipality] has decided whether it will grant a variance from the application of its regulations." 473 U.S. at 192 n.12.

Having failed to submit a development plan under the present land use regulations and having failed to apply for a variance from those regulations, Bishop has absolutely failed to meet the final decision requirement. Therefore, its taking claims are not ripe for adjudication by a federal court.

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[39] (continued)
Bishop's Petition, p. 4 n.5. The district court, however, explained away Bishop's purported mystery. In reaching its decision that Bishop had failed to satisfy the final decision requirement, the district court stated that:

> The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

649 F. Supp. at 942 n.21 (Appendix E 36 n.21) (emphasis in original).

B. The Futility Exception Does Not Excuse Bishop From Meeting The Final Decision Requirement.

Bishop does not claim that it satisfied the final decision requirement. Rather, Bishop seeks to avoid the requirement by claiming that "[h]aving to seek further City approvals[40] to achieve 'ripeness' would have been an exercise in utter futility. . . ." *See* Bishop's Petition, p. 28.[41] The so-called "futility exception" to the final decision requirement holds that the requirement may be avoided if the plaintiff can show that an attempt to comply with the requirement would be an " 'idle and futile act.' " *Kinzli*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). The plaintiff has the " 'heavy burden' " of showing futility. *Lake Nacimiento*, 841 F.2d at 876 (quoting *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981)).

Bishop cannot meet this heavy burden for the same reason that it cannot satisfy the final decision requirement. Bishop has never made *any* application, let alone a meaningful one, pursuant to the regulations at issue, nor has it made a meaningful application for a variance from those regulations. A plaintiff cannot rely on the futility exception until *at least* one "meaningful application" has been made to expose the type and intensity of development legally permitted on the subject property and *at least* one "meaningful application" has been made for a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876-77; *Herrington*, 834 F.2d at 1495-96; *Kinzli*, 818 F.2d at 1454-55.[42]

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[40] Bishop suggests that this would be the eighth time it sought City approval, but *see supra* note 17 and accompanying text.

[41] Bishop claims futility on the basis that "the City" made it clear that it would not permit any private land uses unless Queen's Beach was donated to the City. For the problems with this claim *see supra* note 23 and accompanying text.

[42] The answer, therefore, to Bishop's question regarding the number of times a landowner "must beat his head against a brick wall," *see* Bishop's

(continued)

Bishop has never applied for permission to develop under the challenged regulations or for a variance from the challenged regulations. Therefore, the "futility exception" is not available to Bishop. That heavy burden has not been met. "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington*, 834 F.2d at 1496 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 188; *Kaiser Dev. Co.*, 649 F.Supp. at 942). Bishop merely alleges futility.

C. Bishop Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation.

The second condition that must be satisfied before a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is that the landowner must prove that state procedures for obtaining just compensation are inadequate. *See Williamson County Regional Planning Comm'n*, 473 U.S. at 196-97; *Hoehne*, 870 F.2d at 534; *Lake Nacimiento Ranch Co.*, 841 F.2d at 879-80; *Austin*, 840 F.2d at 680; *Kinzli*, 818 F.2d at 1455.[43]

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[42] (continued)
Petition, p. 29, is at least once. Bishop cannot, however, meet the one meaningful application requirement.

The one meaningful application requirement also provides the answer to Bishop's inquiry regarding "combination of uses." Bishop asks whether a land owner must apply for all combinations of uses, *see* Bishop's Petition p. 29 n.31, and the answer is, of course, no. A land owner can resort to the futility exception after one meaningful application. Once again, however, Bishop cannot meet that requirement.

[43] Despite Bishop's grumblings about the "challenge" to the plaintiff, *see* Bishop's Petition, p. 27, the burden is upon the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate. . . ." *Williamson County Regional Planning Comm'n*, 473 U.S. at 197.

The courts below did not, as Bishop seems to suggest, construe *Williamson County* as requiring state court litigation even where state remedies are unavailable or uncertain. Rather, the district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix A 2), that Bishop "has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate." 649 F. Supp. at 942 (Appendix E 36).[44]

Bishop also suggests that it was "conceded" that Hawaii's procedures were unavailable or inadequate. *See* Bishop's Petition, p. 27. That suggestion requires elaboration. No such concession was made in this case. In *Lai*, the defendant City and County of Honolulu stipulated that there were no state procedures in Hawaii for recovering just compensation pursuant to inverse condemnation claims. Certainly, that stipulation does not constitute case law that bound the courts below in their deliberations in this case,[45] and it would appear, in fact, that the stipulation executed by the parties in *Lai* was ill-advised. In *Austin*, where the defendant City and County of Honolulu did not enter into a stipulation regarding the availability of state remedies, the Ninth Circuit concluded that the plaintiff could seek compensation pursuant to the Hawaii Constitution and Haw. Rev. Stat. § 101-3. 840 F.2d at 681. The *Austin* Court then held that the plaintiff's claim was not ripe because the plaintiff failed to prove that relief under those state laws would be inadequate. *Id.* at 680-81. *Austin* is conspicuously absent from Bishop's discussion of the availability and adequacy of state remedies.

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[44] Without the benefit of elaboration, Bishop suggests that the decision by the court of appeals in this case "conflicts" with *Herrington*. *See* Bishop's Petition, p. 27. To the extent that the perceived conflict is that the second requirement of the ripeness doctrine was not applied in *Herrington*, the court there explained that it was not applying the requirement that the plaintiff prove that state procedures for obtaining just compensation are inadequate because no Fifth Amendment takings claims were being raised therein. 834 F.2d at 1499 n.10. Obviously, that is not the case here.

[45] The court of appeals specifically considered *Lai*, and concluded that the decision in *Lai* did not "change the validity of [the district court's] reasoning or the result in this appeal." 898 F.2d at 113 (Appendix A 2).

Finally, Bishop contends that state remedies are, in fact, unavailable in Hawaii state courts. In support of that contention, Bishop cites *City and County of Honolulu v. Chun*, 54 Haw. 287, 506 P.2d 770 (1973), and *Honolulu Memorial Park, Inc. v. City and County of Honolulu*, 50 Haw. 189, 436 P.2d 207 (1967). It should be pointed out as a preliminary matter that Bishop, in attempting to satisfy its burden on this issue, did not provide either of the courts below with these citations. Therefore, these cases should be given little, if any, weight by this Court.

In any event, these cases do not support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts. *Chun*, which Bishop, for the first time, cites for the proposition that "Hawaii courts did not permit an action in inverse condemnation seeking just compensation for takings affected by precondemnation blight," *see* Bishop's Petition, p. 27, is a direct condemnation action. Rather than offering any insight into how the court would handle an action in inverse condemnation, *Chun* discusses when the value of the taking is to be established in a direct condemnation action. 54 Haw. at 288-89. *Chun* concludes that, in a direct condemnation action, the value of the condemned property is set at the date of the summons. *Id.* at 289. *Chun* does not foreclose a property owner from filing an inverse condemnation action for damages occurring prior to that date.

Bishop's new-found reliance on *Honolulu Memorial Park* is even more misplaced. *Honolulu Memorial Park*, which Bishop cites for the proposition that Hawaii "did not even permit an action for just compensation for physical seizure of privately owned land," *see* Bishop's Petition, p. 27, is an action for ejectment. In explaining the nature of an action for ejectment, the Supreme Court of the State of Hawaii stated that "it does not in anyway include condemnation of property," 50 Haw. at 194, and, therefore, "evidence [of damages] is immaterial. . . ." *Id.* Obviously, neither of these cases can fairly be said to support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts.

The courts below properly concluded that Bishop had failed to prove that just compensation is not available under Hawaii law. Given that conclusion and the earlier conclusion that Bishop had failed to meet the final decision requirement, Bishop's takings claims are not ripe for federal adjudication.

CONCLUSION

For the foregoing reasons, including the Petitioners' failure to comply with Rule 14.5 of the Rules of the Supreme Court, the Respondent City and County of Honolulu respectfully urges this Court to deny the Petitioners' petition for a writ of certiorari.

Respectfully submitted,

H. BISSELL CAREY, III
Counsel of Record

STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of Corporation Counsel,
City and County of Honolulu

Attorneys for Respondent

March 8, 1991

No. 90-1078

In The

Supreme Court of the United States

October Term, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 90-1078

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Written consent to the filing of this brief has been granted by counsel of record for petitioners and has been lodged with the clerk of this Court. Consent has

been withheld by counsel for respondent, City and County of Honolulu.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth Amendment to the United States Constitution.

The opinion below holds that a cause of action for inequitable precondemnation activities merely states a "type" of regulatory takings claim. In order to prevail on such a claim, the court below requires that economically viable use of the property be denied. Amicus believes this construction of takings jurisprudence is fundamentally incorrect and is in direct conflict with the recent land use decisions of this Court. Moreover, amicus believes the ruling poses a serious threat to the integrity of private property rights and the constitutional prohibition against the taking of private property without just compensation.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: March 7, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
EDWARD J. CONNOR, Jr.

Attorneys for Amicus Curiae

No. 90-1078

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

This case involves a 20 year effort to develop the area known as Queen's Beach, a 210-acre parcel of land at the northeasterly end of the Hawaii Kai community in the City and County of Honolulu (city). Appendix to Petition for Writ of Certiorari (Pet. App.) at E 3. The petitioners are the trustees of the Bernice Pauahi Bishop Estate (Bishop Estate), which owns the Queen's Beach property. The right to develop the parcel is held by Kaiser Hawaii Kai Development Company (Kaiser) through a contractual arrangement with Bishop Estate. Pet. App. at E 2.

The complete chronology of facts involving the development efforts for Queen's Beach is provided in the petition for writ of certiorari (Pet.) and need not be repeated here. *See* Pet. at 3-15. Amicus will limit its recounting to the essential facts related to the arguments presented by amicus.

Throughout the 1960s and 1970s, Queen's Beach was designated in the Honolulu general plan as a resort and commercial area. Pet. App. at E 4. Consistent with this general plan designation, Kaiser planned to build a hotel/resort complex on the property. *Id.* Numerous efforts to secure development approval were submitted but each was rebuffed by the city. Ultimately, in 1983 and 1984, the general plan and zoning designations for the property were changed to preservation and parkland. *Id.*

This lawsuit followed.[1] Among other claims, Bishop Estate alleged that the city's land use restrictions effected

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[1] The original plaintiff in this action is Kaiser Hawaii Kai Development Company. Petitioners, Trustees of (continued)

a taking without just compensation. The District Court identified two separate takings theories pursued by Bishop Estate. First, a taking was alleged based on denial of all economically viable use of Queen's Beach. The alternative ground for a taking alleged that the city engaged in inequitable precondemnation activities. Pet. App. at E 7-9.

In support of the inequitable precondemnation activities theory, Bishop Estate maintains that the city has been on a mission to acquire Queen's Beach for a park since 1970. Pet. App. at E 6. In order to accomplish that objective, Bishop Estate contends that the city attempted to impose unreasonable exactions requiring dedication of oceanfront property for use as a public park; that the city downzoned the parcel and downgraded the allowable density to depress the acquisition price; and that the city's policy has been to freeze development at Queen's Beach until it could be acquired for a public park. Pet. App. at E 6-7. Bishop Estate maintains that these actions amounted to inequitable precondemnation activities for which compensation is due. *See Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983).

The District Court determined that the takings claim based on denial of economically viable use was not ripe under this Court's standards developed in *Williamson County Regional Planning Commission v. Hamilton Bank,*

Bishop Estate, are plaintiffs/intervenors. Kaiser has filed its own petition for writ of certiorari which this amicus also fully supports.

473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). Pet. App. at E 35.

As to the inequitable precondemnation activities claim, the District Court was not hampered by the *Williamson County* finality requirement. The District Court explained that claims based on denial of economically viable use necessarily require a final decision of the type and intensity of use permitted. In contrast, a takings claim based on inequitable precondemnation activities does not involve an inquiry into the available uses of a parcel, but instead focuses on the inequitable purposes of government conduct. The District Court stated: "An analysis of beneficial uses is irrelevant, however, to a claim for inequitable precondemnation activities." Pet. App. at E 37. The District Court therefore concluded that the inequitable precondemnation activities theory was not subject to the finality requirement and was ripe for consideration. Bishop Estate could proceed to prove its allegations at trial.[2]

At the close of the evidence offered by Bishop Estate, the District Court granted the city's motion for a directed verdict. The basis for the directed verdict was that Bishop Estate had not proven that economically viable use of the

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[2] The District Court's opinion does not address whether the inequitable precondemnation activities claim is subject to the requirement that compensation be first sought in state court. This omission from the opinion however is of no consequence since Hawaii state law does not recognize a right to compensation based on inequitable precondemnation activities. *See* Pet. App. at 27 (citing *City and County of Honolulu v. Chun*, 54 Haw. 287, 288-89, 506 P.2d 770, 773 (1973)).

property was denied. Pet. App. at C 5. The ruling, however, directly contradicted the District Court's prior analysis that an inquiry into the beneficial uses of a parcel is "irrelevant" to an inequitable precondemnation activities claim.

The Ninth Circuit affirmed and repeated the notion that an inequitable precondemnation activities claim requires a showing that economically viable use has been denied.

> "A cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has ' "denie[d] [him] economically viable use of his land." ' " Pet. App. at B 9 (brackets in original).

The petition for writ of certiorari in part asks this Court to consider whether denial of economically viable use is required to be proven when a takings claim is based on inequitable precondemnation activities. More specifically, when a municipality takes actions to delay or freeze development and engages in unreasonable and extortionate exaction demands for purposes which are not based on good faith regulatory objectives but are geared toward future public acquisition of the property for free or substantially below market value, does the owner present sufficient support for a taking claim even if some vestige of remaining use might be available? The court below said the answer is no.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFOUNDS AND MISAPPLIES THIS COURT'S TAKINGS JURISPRUDENCE

A. This Court Has Consistently Recognized That Regulatory Actions Affecting Property Must Be for Legitimate Regulatory Purposes

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court established that a land use regulation effects a taking if it does not substantially advance legitimate state interests, *or* denies the owner economically viable use of the land. These tests are stated in the disjunctive thereby providing alternative grounds on which to base a taking. *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984) ("[i]n *Agins*, the Supreme Court identified two means by which a 'taking' may occur").

On several other occasions this Court has reaffirmed that to avoid a taking, government actions abridging property rights must be for legitimate regulatory purposes. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 127 (1978) ("may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., dissenting) (majority did not reach takings merits; Justice Scalia recognized taking claim based on failure to advance legitimate regulatory purposes).

Most significant is *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where this Court concluded that an exaction of a public access easement was unrelated to any legitimate regulatory purpose and therefore amounted to a taking without just compensation. Relying on the "substantially advance legitimate state interests" test in *Agins*, this Court characterized leveraging of the police power to obtain unrelated dedications an "out-and-out plan of extortion" which was well beyond the "outer limits" of legitimate state interests. *Id.* at 837.

B. Seeking to Extort Land Dedications and Downzoning or Delaying Development So As to Depress Property Values and Thereby Acquire a Public Park Without Payment of Compensation Is Not a Legitimate Purpose of Regulation

Nollan is clear that extortion and leveraging of the police power are not legitimate regulatory objectives. Likewise, numerous decisions recognize that actions intended to depress property values for future acquisition are inequitable activities for which compensation is required. *See, e.g., Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622, 625-27 (Fla. 1990), and cites therein; *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52 (1972); *Martino v. Santa Clara Valley Water District*, 703 F.2d at 1147, and cites therein.

C. Takings Claims Based on Improper Regulatory Actions Do Not Require Proving Denial of Economically Viable Use

As stated above, the *Agins* formulation states two separate tests on which a taking may be based. *Nollan* is

particularly clear that the "substantially advance" test analyzes the conduct of government and seeks to determine whether legitimate regulatory purposes are advanced.[3] The fact that some economically viable use for the parcel might remain simply has no bearing whatsoever on whether or not the conduct of government went beyond the limits of legitimate regulatory objectives.

Nollan hammers this point down firmly. This Court recognized that the California District Court of Appeal rejected Nollans' taking claim because the public access condition "did not deprive them of all reasonable use of their property." *Nollan*, 483 U.S. at 830 (citing *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723 (1986)). In other words, the California appellate court in *Nollan* relied on reasoning identical to that of the Ninth Circuit in the present case. But this Court's takings conclusion in *Nollan*, which was based on an analysis of the *conduct* of the Coastal Commission, was not influenced in any way by the fact that the Nollans could build their

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[3] In *Nollan* this Court stated: "[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them." *Nollan*, 483 U.S. at 837.

The opinion continued, "where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

house if they succumbed to the permit condition. Similarly, any remaining economically viable use of Queen's Beach is irrelevant to the claim that the city engaged in inequitable conduct and extortionate activities for the purpose of depressing values and acquiring a public beach on the cheap.

D. Under the Federal Practice of Notice Pleading, It Makes No Difference Whether the Claim Is Labeled As Inequitable Precondemnation Activities, or As a Nollan Extortion/Exaction Claim, or As Simply a Failure of the Regulation to Substantially Advance Legitimate Governmental Purposes

The practice in federal court is notice pleading. *American Timber & Trading Co. v. First National Bank of Oregon*, 690 F.2d 781, 786 (9th Cir. 1982). It does not matter what labels were assigned to Bishop Estate's claims as long as the city received fair notice of the nature and basis of those claims. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979). Here, the city was very aware that Bishop Estate sought compensation based on the city's extortionate policies and other inequitable activities designed to depress property values in order to acquire a public park. Those facts are a proper basis for a takings claim under the first *Agins* test and the *Nollan* decision. Recovery cannot now be denied simply because a particular label may or may not have been ascribed to the claim by the District Court.

II

THE DECISION BELOW TYPIFIES THE NECESSITY FOR THIS COURT TO PROVIDE FURTHER GUIDANCE IN THE TAKINGS FIELD

A. As Illustrated by the Decision Below, Many Lower Federal and State Courts Are Struggling with, and Misinterpreting, This Court's Takings Jurisprudence

Four years have passed since this Court's landmark 1987 rulings in the takings field. Despite those notable efforts, lower courts continue to apply takings theories in a haphazard and nonprincipled manner.

The decision below illustrates the problem of a lower court latching onto a single phrase or standard, in this case "economically viable use," and rejecting a takings claim on that basis alone without consideration of the nature or type of takings claim being presented. More troubling is the fact that this is not an isolated aberration. In *Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989), an exaction of property for street widening purposes was ruled invalid but compensation was nevertheless denied because the illegal exaction did not preclude all economic use of the entire property. *Id.* at 264. Similarly, in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), the Third Circuit rejected a taking claim even though the city denied building permits for "partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129. Ignoring the *Agins* and *Nollan* first prong test, that court reasoned that arbitrary refusal to issue building permits was not a compensable taking since "all use" was not denied and the owners "retained

the right to put their land to a variety of alternative uses." *Id.* at 1131.

In contrast with *Moore, Bello,* and the decision below, the Eleventh Circuit recognizes a compensable taking when a property owner is subject to arbitrary building prohibitions even though alternative uses may be available. *Wheeler v. City of Pleasant Grove,* 746 F.2d 1437 (11th Cir. 1984) (*Wheeler II*); *Wheeler v. City of Pleasant Grove,* 833 F.2d 267, 270 (11th Cir. 1987) (*Wheeler III*). *See also A.A. Profiles, Inc. v. City of Ft. Lauderdale,* 850 F.2d 1483, 1487-88 (11th Cir. 1988).

Other courts struggle at an even more fundamental level. For example, in *Presbytery of Seattle v. King County,* 114 Wash. 2d 320, 787 P.2d 907 (Wash. 1990), the Washington Supreme Court created a new and radical "threshold inquiry" which redefines takings claims into substantive due process claims. 787 P.2d at 912. By insulating a whole class of regulation from Takings Clause scrutiny, and limiting the legal analysis to a so-called, noncompensable substantive due process test, the Washington court was able to circumvent the compensation requirement upheld in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987). The Washington court summarized the effect of its ruling this way:

> "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern. . . . Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'taking' formula." *Presbytery,* 787 P.2d at 913-14.

The degree of conflict among the state and federal courts can be appreciated by comparing the takings analysis in the above-referenced decisions (including the opinion below) with the takings analysis employed by the highest court of New York in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989). Whereas the Washington court in *Presbytery* strived to create a new threshold inquiry in an attempt to avoid takings altogether, *Seawall Associates* applies this Court's precedents in a straightforward manner. The divergent takings analysis applied by these two states illustrates the tremendous lack of uniformity among courts.

B. The Time Has Arrived for This Court to Revisit the Takings Clause and Forcefully Clarify the Principles and Analysis To Be Applied by Lower Courts

If left unchecked, takings jurisprudence will continue to unravel into utter chaos. The decision below will surely be cited as precedent in other cases and the error here will be repeated and compounded. Numerous respected commentators have appropriately recognized the confusion now besetting regulatory takings law. *See* Mandelker and Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law and Zoning Digest 3 (Jan. 1990); Settle, *Regulatory Takings Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989); Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning and Planning Report 57 (Sept. 1990).

The public interest strongly supports a principled and consistent interpretation of the constitutional limitation presented by the Takings Clause of the Fifth Amendment. This Court is the only body which can fulfill that immediate need. There should not be one rule in the State of Washington and another in the State of New York; nor should there be one rule in the Ninth Circuit and another in the Eleventh Circuit.

C. The Decision Below Presents an Excellent Opportunity for This Court to Clarify Takings Jurisprudence and Principles

The decision below applies the "economically viable use" test to a takings claim which should not involve considerations of the beneficial uses available for a parcel. Accordingly, resolution of this case will require setting forth the principles which underlie the various takings tests employed by this Court. Specifically, this case provides an opportunity for clarifying and distinguishing between the alternative takings tests established in *Agins* and applied in *Nollan*. Such clarification would be of great benefit to property owners and regulators seeking to understand the scope of the constitutional protection against uncompensated takings.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to grant the petition for writ of certiorari.

DATED: March, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

(4)

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GIDEON KANNER
Counsel of Record
CROSBY, HEAFEY, ROACH & MAY
700 South Flower Street, Suite 2400
Los Angeles, California 90017
(213) 628-6733

G. RICHARD MORRY
CHERYL A. NAKAMURA
RUSH, MORE, CRAVEN, SUTTON, MORRY & BEH
745 Fort Street, 20th Floor
Honolulu, Hawaii 96813
(808) 521-0400
Attorneys for Petitioners

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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GIDEON KANNER
Counsel of Record
CROSBY, HEAFEY, ROACH & MAY
700 South Flower Street, Suite 2400
Los Angeles, California 90017
(213) 628-6733

G. RICHARD MORRY
CHERYL A. NAKAMURA
RUSH, MORE, CRAVEN, SUTTON, MORRY & BEH
745 Fort Street, 20th Floor
Honolulu, Hawaii 96813
(808) 521-0400
Attorneys for Petitioners

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I. THERE IS NO REAL DISPUTE OVER THE FACT THAT RESPONDENT ENGAGED IN PROSCRIBED CONDUCT.

Respondent (Honolulu) disregards those parts of the record that form the core of Petitioners' case. Honolulu flouts the rule of *United States v. Diebold*, 369 U.S. 654, 655 (1962) that where the appeal is from a directed verdict the facts must be viewed favorably to the Petitioner. Instead, Honolulu favors itself by construing the record and excises from its presentation facts that are unfavorable to it. So what if Honolulu's Mayor and planning officials engaged in open extortion? — says Honolulu (Br. Opp., pp. 10-11) — they did not do so "officially." So what if Bishop Estate sought judicial relief for this constitutional violation? — says Honolulu — it did not do so "separately." (Br. Opp., p. 15).[1]

All this demonstrates Honolulu's preoccupation with legal quiddities that are alien to constitutional adjudication. As this Court put it in *United States v. Dickinson*, 331 U.S. 745, 748 (1946): ". . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate, and when they die."

Honolulu tries to divert the Court's attention from extensive (and on this record uncontroverted) evidence of a lengthy municipal course of conduct spanning two mayoral administrations, whereby at every level of municipal governance it openly and unblushingly communicated to

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[1] That approach to the depiction of facts thus echoes what happened below. Please note that in the Court of Appeals, as here, Honolulu (see Br. Opp., pp. 4-5, fn. 9) simply asserted that Petitioners' presentation was inaccurate, but never explained why or how, pleading "page limitation on the City's brief" as an excuse for its supposed inability to present the Court below with its version of a proper statement of facts. Now Honolulu has presented this Court with 26 densely printed pages, but is still unable to find enough space to discuss any evidence of the extortionate municipal demands that are the core of Bishop Estate's *Nollan* claim. How odd.

Petitioners that no approvals for any reasonable uses of land in the Hawaii Kai area would be granted unless Bishop Estate first "donated" some 80 acres of prime beach land concededly worth tens of millions of dollars. Similar demands, as Duran testified, were *always* made by Honolulu — they were municipal policy. There is absolutely nothing in the cases cited by Honolulu at Br. Opp., p. 11, n. 25, that is in any way inconsistent with Bishop Estate's position. In fact, *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), makes clear that municipal policy may be discerned from a single statement of an official (see *Id.* at 123). Here, *a fortiori*, the Honolulu policy of extortion complained of came from two successive mayors as well as other city officials charged with administering the very land-use matters that are the subject of this lawsuit. If these people do not make Honolulu policy in such matters, then who does?

Confronted with that reality, Honolulu now sweeps crucial evidence under a rhetorical rug with the dismissive assertion that all those openly extortionate demands (see Pet. Cert., pp. 14-15), were not "official." Stripped to its essence, Honolulu's argument is that unless city officials who set out on a course of constitutional violation, do so by some sort of "official" resolution or some such solemn formality, the city governed by them can *de facto* violate the Constitution to its heart's content with impunity, and there is no need to bother this Court with what it actually did. But that is not how these matters are judged; as Justice Stewart put it in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring): "But the Constitution measures a taking of property not by what a State says, or what it intends, but by what it *does*." (Emphasis in the original.)

Moreover, Honolulu's argument is self-contradictory. If it means to assert that evidence of these extortionate demands should be disregarded because they were not "official" (see Br. Opp., pp. 10-11), doesn't that destroy its simultaneous argument that Petitioners' claim arising out of those demands was not properly raised below? Was there, or

wasn't there evidence of attempted municipal extortion? Plainly, there was. Honolulu's argument thus reduces itself to the absurdity that yes, there was on this record uncontroverted evidence of municipal extortion, but the extortion wasn't "official" and Bishop Estate's claim based thereon wasn't "separately" stated.[2] Thus, goes Honolulu's argument, the federal judiciary is precluded by these word games from granting relief for these plain constitutional violations.

Honolulu's argument also fails on its own premise. Honolulu, like any governmental or corporate entity, can only act through its officials. Thus, its argument reduces itself to the absurdity that unless those who govern such an entity "officially" confess by putting their unlawful purpose on the record, they and the entity governed by them may freely violate the Constitution with impunity. This Court has already recognized that municipal officials cannot be expected thus to flaunt their unlawful conduct, and in *Village of Arlington Heights v. Metro. Housing Dev. Co.*, 429 U.S. 252, 267 (1977) has opted for a realistic approach that calls for the drawing of inferences from suspicious municipal conduct (precisely the sort of thing that should have been heard and decided by the jury). In short, Honolulu willfully confuses official activity with the formalities that may or may not accompany it. It ignores the self-evident truism that constitutional rights can be violated "unofficially" as well as "officially." In Justice Frankfurter's noted words in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Constitution guards against sophisticated as well as simple-minded state contrivances seeking to defeat rights protected by it.

This record is clear that Honolulu did in fact engage in a pattern of extortionate demands, and that this was its consistent policy (*i.e.*, Honolulu "always" tried to extort "goodies" in exchange for permits; see Pet. Cert., pp. 14, 15, n. 20). Its own officials unequivocally so testified (see testimony quoted at Pet. Cert., pp. 13-14). Honolulu

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2 "Separately" from what, one might ask?

prevailed below on this point not because its conduct was not "official" but supposedly because the *Nollan* claim was not "separately" raised below.[3] One is left to wonder what all that evidence (whose accuracy for once is not impugned by Honolulu)[4] is doing in the record if — according to it — the matter was not even raised.

II. RESPONDENT'S PRESENTATION IS SELECTIVE AND SELF-CONTRADICTORY.

Honolulu has a great deal to say and it says it forcefully. Unfortunately, missing from this bluster is a candid discussion of two fundamental factors.

A. Respondent's Presentation Defies *Agins v. City of Tiburon*, And Confuses Legitimate Police Power Regulation With Predatory Constitutional Violations.

Even on its own premise, Honolulu fails to address the most fundamental shortcoming of the Opinion below; namely, where the charge is that the municipal .conduct in question is illegitimate (*i.e.*, where its purpose is not to regulate in furtherance of public health, safety, welfare and

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[3] Just what the legal significance of the word "separately" is supposed to be, and why Honolulu considers it so important as to italicize it in its presentation (Br. Opp., p. 15) is a mystery. Honolulu certainly offers no explanation. See *post*, pp. 7-8.

[4] In may not be inappropriate to note here, if only to provide this Court with a glimpse of how aggressive advocacy can distort the way in which things are presented to it, that following oral argument in the court below, the presiding Circuit Judge went out of his way in open court to express the Court's compliments to counsel for an extraordinarily high quality of presentation of the case at bench. So did counsel for Honolulu, to Bishop Estate's counsel — privately, of course. Now this Court is being told that Bishop Estate's presentation has been consistently deficient in every conceivable way. There has to be a moral in that, and we are certain the Court will discern it.

morals, but to "soften up" a land owner as a prelude to contemplated municipal acquisition of his land) is such municipal conduct reviewable by a "good faith" standard, or *solely* by a "denial of all economic use" standard? In *Agins v. City of Tiburon*, 447 U.S. 255, 261, n. 9 (1980), this Court went out of its way to make clear that where precondemnation blight is in issue — as opposed to proper police power regulation — liability *vel non* turns on presence of "good faith planning."

Honolulu (Br. Opp., pp. 12-13) thus advances the notion that even where government conduct does *not* advance a legitimate public purpose, it can nonetheless be indulged in with impunity unless it is totally destructive of the victim's rights. That is neither good sense nor good law. A substantial impairment of property rights is sufficient to establish liability where the government lacks the defense of exercising of the police power. See Amicus Curiae Brief of Pacific Legal Foundation, pp. 9-12, and the authorities collected there; also see Pet. Cert., pp. 23-24, n. 27.

Even apart from precondemnation blight, such liability also follows from this Court's other teaching in *Agins*, that a taking results where the ostensibly regulatory municipal act "does not substantially advance legitimate state interests" (447 U.S. at 260).[5] That is the view of virtually every American court that has considered the issue; *i.e.*, where the purpose of the ostensible regulation is to facilitate land acquisition, a substantial impairment of private property rights is sufficient to establish liability (see cases collected at Pet. Cert., pp. 23-24, n. 27, particularly *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975) for its excellent analysis of the limits of the police

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[5] It is basic that municipal activity overtly calculated to frustrate the Just Compensation Clause of the Fifth Amendment, by depressing values of land sought to be acquired is illegitimate. *See United States v. Reynolds*, 397 U.S. 14, 16 (1970), *United States v. Virginia Electric Co.*, 365 U.S. 624, 625 (1961), *cf. Almota Farmers Elevator & Whse. Co. v. United States*, 409 U.S. 470, 480 (1973) (Powell and Douglas, J.J., concurring).

power in the context of governmental precondemnation activities; *i.e.*, where the government engages in precondemnation blighting of land it means to acquire, it is no longer entitled to judicial deference because then it is no longer governing but placing its thumb on the scale for its own advantage).

Far more important at this time is the fact that — as shown by numerous cases involving such governmental misconduct (Pet. Cert., pp. 23-24, n. 27) — this illegitimate practice is common. Yet, in spite of the state and lower federal courts' condemnation of it, it persists. The opinion below, however, without analysis departs from the prevailing law and sets the stage for needless confusion.[6]

B. The *Nollan* Municipal Extortion Issue Was Duly Pled And Tried Below, As Is Apparent From The District Court's Opinion And The Quoted Record.

On the issue of whether the *Nollan* municipal extortion issue was raised below, Honolulu does not deny that it was,[7] but merely plays word games by asserting that it was not "separately" raised — whatever that means. One should not have to cite for this Court the hornbook proposition that federal rules do not contemplate any such thing; no separate statements of legal theories or causes of action are required. Pleading a "short and plain statement of the claim" is all that

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[6] When the terse per curium opinion below first came down, it was unpublished. But once this astonishing holding on the issue of precondemnation blight was read by government lawyers they (particularly the California Attorney General) implored the Court of Appeals to publish its opinion, so that they would have something favorable to cite on this point on which the great weight of authority has rejected their arguments. On this point, the opinion below is simply a gratuitious generator of conflict in the law, and of confusion.

[7] Nor can it. The District Court opinion below (see 649 F. Supp. 929-930) expressly notes that Bishop Estate did raise an improper extortion claim below.

is needed. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). For a concise statement of pertinent rules (collecting authorities ranging from this Court's decisions to leading treatises) *see Patriarca v. F.B.I.*, 639 F. Supp. 1193, 1198 [4] (D. R.I. 1986). Nor are any "separate" presentations required at trial. At no time did Honolulu assert at trial that some sort of "separate" trial of plaintiffs' legal theories or "causes of action" was required. In any event, such things are matters of procedure that at most entail convenience of presentation (*Conley v. Gibson, supra; O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 392-393, including n. 6 (1949)). It is simply shocking for deserving litigants to be told years after the fact that substantive relief on their duly pled and tried claim is to be denied in spite of clear evidence favoring relief, merely because they supposedly did not raise a theory of recovery "separately."

The trial court's opinion itself makes clear (see 649 F. Supp. at 929-930) that Bishop Estate did raise a *Nollan* claim (see Pet. Cert., p. 13, n. 19). Once raised, that claim was properly before the trial court; it did not vanish into thin air.[8] As for Honolulu's citation to the record (Br. Opp., pp. 16, 17) in asserted support of the proposition that Bishop Estate supposedly disclaimed reliance on *Nollan*, there are two quick answers: first, the cited record in no way supports a waiver of the *Nollan* issue, and second, it is so crudely wrenched out of context as to leave one gasping in disbelief. Suffice it to say that only one page earlier in the record (RT 36-56) plaintiffs' trial counsel was relying on *Nollan* explicitly. Indeed, he argued: "Certainly, I disagree with [Honolulu counsel's] point that this is only a regulatory case. This certainly is not. It's true that the City had a goal here, it's very clear that park was the goal, and I believe all of the 1980 series of regulations really were implementing that goal to deny that resort, to acquire park." (RT 36-68 through

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[8] What Honolulu fails to mention is that Bishop Estate's *Nollan* type of claim was also raised by the pretrial statement, and thus undeniably became an issue for trial.

36-69). Counsel went on (at RT 36-82) to stress *Nollan's* language that ". . . 'a public entity should not leverage the use of police power either to exact a public interest or to further a condemnation acquisition' . . ."

More importantly, how the trial court could acknowledge this claim and then somehow dispose of the entire case by summary judgment and directed verdict without mentioning it, is a mystery. How Honolulu can argue in the face of this record that the *Nollan* claim was not properly raised is another mystery. No doubt that accounts for Honolulu's investing the phrase "separate claim" (Br. Opp., p. 15) with positively mystical, albeit legally unsupported [and unsupportable] significance. But the issue was before the trial court and much evidence was taken on it. The trial court itself elicited testimony (see Pet. Cert., p. 15, n. 20) that in defiance of the *Nollan* rule Honolulu always tries to obtain an exaction [irrespective of any required nexus].

III. A WORD ON POLICY.

In a way, what is most unfortunate about Honolulu's brief is its tone. It is thus appropriate to observe that Petitioners are not some sort of enemy. They are law-abiding Americans within the purview of the Bill of Rights. Their "transgression" is said to be their desire to put their own property to legitimate, constructive uses subject only to *reasonable* regulation. That to do so is their constitutional right is what this Court has taught us in *Nollan*. Avowed municipal attempts at extortion — whether "unofficial" or "official" — are simply antithetical to the Constitution.

In an era in which constitutional rights of society's concededly unworthy members receive sensitive review and punctilious protection by the judiciary, there is something profoundly troubling about a case in which perfectly lawful activities of a charitable trust are *de facto* treated as if they were the antisocial ones. This is a form of moral inversion that, with all due respect, the Court should not tolerate.

As this Court put it in *Speiser v. Randall*, 357 U.S. 513, 520 (1958): "The procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." The "procedure" whereby Bishop Estate's *Nollan* claim was adjudicated below fails that test. It even fails to meet the rudiments of due process. The substantive rule of liability for predatory blighting of private property, articulated by the Court below, is at odds with prevailing American law. The *de facto* endorsement of Honolulu's word game that in the federal courts legal theories must somehow be "separately" pursued is worse.

What is at stake here transcends the constitutional rights of the Petitioners. The law of takings remains in chaos; *see* Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 Ark. L. Rev. 65, 77-79 (1991), collecting numerous expressions by renowned authorities virtually vying with one another to come up with a suitably pejorative characterization of the state of the law; Peterson, *The Takings Clause: In Search of Underlying Principles, Part I - A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299 (1990), concluding that on the present state of the law there is no discernible doctrinal basis on which to determine when a harsh regulation is a taking.

In the end, law-abiding American property owners have constitutional rights too. They have a just claim to a fair share of this Court's attention, at least to the minimal extent of being told (a) what are the elements of a nonphysical taking, and (b) exactly what are the procedural preconditions to pursuit of judicial relief.[9] The present *ad hoc*, case-by-

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[9] The case at bench is a paradigm. Bishop Estate — counting all the proposals for development, formal as well as informal — says that there were some half-dozen attempts to develop the Queen's Beach area. Honolulu indignantly replies that there were "only" two (but see 649 F. Supp. at 941, n. 19, for the trial court's version of these efforts to develop the subject property — that certainly looks like more than two). But whichever of these

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case approach simply isn't working; this Court has not decided a sufficient number of such cases on the merits to provide lower courts and litigants with effective guidance. The present situation needlessly burdens parties and the already congested lower courts, and its predictive attributes are so poor as to give the process a greater resemblance to an elaborate lottery than to a judicial process conducted under a rule of law.

CONCLUSION

Bishop Estate urges that the instant Petition presents the Court with vexing problems of nationwide importance that require addressing, as well as a massive miscarriage of justice.

Bishop Estate prays that the Writ of Certiorari issue.

Respectfully submitted,

GIDEON KANNER

CROSBY, HEAFEY, ROACH & MAY

Attorneys for Petitioners

(ftn. continued)
competing premises one accepts, isn't two enough? *How many times must a landowner beat its head against a brick wall in a futile effort to gain municipal approval to do no more than what this Court characterized in Nollan as a constitutionally protected right? How many times must an American citizen go hat-in-hand to municipal officials to implore them to grant him permission to use his own land for a lawful and constructive purpose? How many times must one do so, even as the municipal officials are announcing to the world by every means of communication available, that they have not the slightest intention of allowing any use of the subject property, except on the unconstitutional, extortionate condition that the enormously valuable 80 acres comprising Queen's Beach be first given to the city as an extralegal tribute?* It is rather difficult to accept the notion that the Court intended to unleash this sort of predatory municipal conduct when it formulated its ripeness rules in inverse condemnation cases. It is even more difficult to countenance the thought that this Court means to acquiesce in such cynical municipal games as tolerable under the Constitution.